Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

ORDER OF FRIARS MINOR,

Petitioner,

v.

EMIL ALPERIN, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit erred in refusing to apply the political question doctrine of *Baker v. Carr*, 369 U.S. 186 (1962), to a class action claim seeking damages for undetermined property losses against the Order of Friars Minor ("OFM") arising from OFM's alleged assistance to a Nazi puppet regime in allegedly transferring property looted during World War II?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioner (a defendant-appellee in the court of appeals) is Order of Friars Minor (erroneously sued as "The Franciscan Order (OFM), Including Croation Franciscans; Croation Cofraternity of the College of San Girolamo Degli Illirici").

The respondents (plaintiffs-appellants in the court of appeals) are Emil Alperin, Jewgenija Romanova, Maria Dankewitsch, Vladimir Morgunov, on behalf of themselves and all other persons similarly situated; Organization of Ukrainian Antifascist Resistance Fighters, Ukrainian Union of Nazi Victims and Prisoners, Vladimir Brodich, William Dorich, Igor Najfeld, on behalf of themselves and all other persons similarly situated; Lizabeth Lalich, Mladen Djuricich, Robert Predrag Gakovich, Nevenka Vukasovic Malinowski, Eli Rotem, Milorad Skoric, Veljko Miljus, Fred Zlatko Harris, Milja Conger, Allen Dolfi Herskovich, Bogdan Kljaic, David Levy, Zdenka Baum Ruchwarger, Vladan Celebonovic, Desa Tomasevic Wakeman, Daniel Pyevich, Koviljka Popovic, Jasenovac Research Institute, The International Union of Former Juvenile Prisoners of Fascism of Ukraine, Russia, and Belarus, on behalf of themselves and all others similarly situated.

The remaining party (a defendant-appellee in the court of appeals) is Istituto per le Opere di Religione (erroneously sued as the "Vatican Bank"), and is expected to file a separate petition for certiorari.

The Order of Friars Minor is an independent juridical entity organized under Italian law. It has no corporate parent and no publicly held company owns stock in it.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The amended opinion and amended concurrence/dissent of the court of appeals (Appendix ("App.") at 1-72) is reported at 410 F.3d 532. The opinion of the district court (App. 73-91) is reported at 242 F.Supp.2d 686.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2005. The court of appeals denied rehearing, but filed an amended opinion with an amended partial concurrence and partial dissent on June 9, 2005 (App. 92-93). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

From the end of World War II to the present day, the United States has been steadily involved in diplomatic efforts to resolve claims involving gold and other valuables looted from the victims of the Nazis and their allies. Shortly after the war, the U.S. entered into executive agreements and treaties with several nations, including Germany, Yugoslavia and Italy, to achieve a comprehensive resolution of Holocaust-era claims for both reparations and restitution. The premise of those treaties and agreements was that all such claims should be resolved under the terms of international agreements.

Toward the close of the last century, the U.S. also entered into similar agreements with Germany, Austria, Switzerland, and France, and continues to pursue comparable agreements with other countries. *See American Insurance Ass'n v. Garamendi* ("*Garamendi*"), 539 U.S.

396, 408 (2003). These recent negotiations and the government-to-government agreements that they are producing, like the treaties and agreements made immediately after the war, seek to secure the private interests in restitution of Nazi war crime victims and to vindicate those injured by the acts of enemy corporations in wartime.

After the issuance of a June 1998 U.S. interagency report on the history of Holocaust-related assets,[1] and apparently dissatisfied with the pace of U.S. diplomatic action, plaintiffs initiated this action. The thrust of plaintiffs' suit is that the Order of Friars Minor ("OFM"), a Franciscan religious order organized under Italian law, allegedly conspired with the Vatican Bank to facilitate the transfer of gold and other valuables looted by the Croatian Ustasha political regime, which was supported throughout the war by Nazi forces, to Ustashi war criminals who fled to Italy in the war's aftermath (Doc. #65).

Factually, the complaint closely tracks the Eizenstat Report (*see* Doc. #65, ¶¶ 4, 57). The named plaintiffs are twenty-four individuals and four organizations who assert claims on behalf of a putative class estimated at 300,000 people worldwide (Doc. #65, ¶¶ 1, 2, 9-36, 62-63). Their third amended complaint is in five counts for conversion, unjust enrichment, restitution, an accounting, and human rights violations. The complaint theorizes that a brotherhood of Croatian priests living just outside the walls of the Vatican safeguarded the valuables removed from Croatia

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[1] See Supplement to Preliminary Study on U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany during World War II, U.S. Dept. of State (June 1998) ("Eizenstat Report"). The Eizenstat Report is Exhibit C to document item number 100 ("Doc. #100") of the record on appeal.

by the fleeing Ustashi. According to plaintiffs, OFM allegedly used the loot to establish and operate a so-called "ratline" that enabled Ustashi war criminals to escape from Europe to South America (Doc. #65, ¶¶ 55-57).

A. United States Foreign Policy on Holocaust-Era Claims.

The recovery of assets looted by the Nazi regime and its allies has been the subject of extensive international negotiations and agreements. In January 1946, the United States and seventeen other nations met in Paris to decide upon the method of distributing war reparations. The Paris conference culminated in the Paris Reparations Treaty, which provided that each signatory nation would receive a percentage of the total reparations the Western Powers collected based on their war-related damages and contribution to the Allied war effort (Doc. #89, Exh. A, Part I, Art. 1).

Pursuant to the Paris Reparations Treaty, each signatory nation's share of assets collected from Germany was supposed to satisfy any and all claims held by a nation, or its nationals, against Germany and its agencies:

> The Signatory Governments agree among themselves that their respective shares of reparation, as determined by the present Agreement, shall be regarded by each of them as covering all its claims and those of its nationals against the former German Government and its Agencies, of a governmental or private nature arising out of the war.

(*Id.* at Part I, Art. 2.A). All acts of German satellite governments, including the one in Croatia, were considered to be acts of Germany itself. *See U.S. v. List*, Trials of War Criminals, Vol. XI, Case 7 at 1302-03 (1948).

Yugoslavia was a signatory to the Paris Reparations Treaty. Significantly, Article 6.E of the treaty provided that German "assets" included "assets which are in reality German assets, despite the fact that the nominal owner of such assets is not a German enemy" (*Id.*). This portion of the Paris Treaty also stated:

> Each Signatory Government shall enact legislation or take other appropriate steps, if it has not already done so, to render null and void all transfers made, after the occupation of its territory or entry into the war, for the fraudulent purpose of cloaking German enemy interests, and thus saving them harmless from the effect of control measures regarding German enemy interests.

(*Id.*)

One year later, in 1947, the United States and nineteen other nations, including Yugoslavia, the U.S.S.R., and the Uk.S.S.R., entered into the Treaty of Peace with Italy (Doc. #89, Exh. B). This treaty contained the following provisions on restitution:

> Section II—Restitution by Italy
>
> Article 75
>
> 1. Italy . . . shall return, in the shortest time possible, property removed from the territory of any of the United Nations.
>
> 2. The obligation to make restitution applies to all identifiable property at present in Italy which was removed by force or duress by any of the Axis Powers from the territory of any of the United Nations, irrespective of any subsequent transactions by which the present holder of any such property has secured possession.
>
> * * * *

> 6. Claims for the restitution of property shall be presented to the Italian Government by the Government of the country from whose territory the property was removed . . . The period during which such claims may be presented shall be six months from the coming into force of the present Treaty.
>
> 7. The burden of identifying the property and of proving ownership shall rest on the claimant Government, and the burden of proving that the property was not removed by force or duress shall rest on the Italian Government.
>
> 8. The Italian Government shall restore to the Government of the United Nation concerned all monetary gold looted by or wrongfully removed to Italy . . . This obligation is recognized by the Italian Government to exist irrespective of any transfers or removals of gold from Italy to any other Axis Power or a neutral country.

(*Id.* at Sec. II, Art. 75).

In the mid-1950s, the executive branch declared that "reparation and other governmental claims relating to World Wars I and II should more appropriately be dealt with in the context of a peace treaty or similar arrangement" (App. at 82, citing to *Letter from John Foster Dulles to President Eisenhower of April 4, 1953*, 83d Cong., 1st Sess. 205 (1953). More recently, in its 1996 summary of compensation programs available to Nazi victims, the executive branch repeated that "[r]eparations claims are to be addressed at the state-to-state level." *See* U.S. Dept. of State, *German Compensation for National Socialist Crimes*, Appendix I, available at *http://www.ushmm.org/assets/frg.htm*. This report added that the U.S. government can pursue the individual claims of persons who were U.S. citizens during World War II, but

that foreign nationals must resolve their claims under the domestic procedures of the country of which they were a national at the time their claim arose. *Id.*

The executive branch's commitment to resolving individual claims arising out of World War II through government-to-government negotiations is also evident from the London Conference on Nazi Gold held in December 1997, at which the Croatian delegation reported on the work of its own special commission to investigate the historic facts about the property taken by the Ustashi and "to review the measures taken so far and those to be taken in the future with an aim of returning or compensating this property" (Doc. #100 (Eizenstat Report) at p. 154).

The London Conference is what led to the enactment by Congress of the U.S. Holocaust Assets Commission Act of 1998, Pub. L. 105-186, 112 Stat. 611, establishing a commission to examine the disposition of Holocaust-era assets in the United States. The Act specifically calls for the President to consider the need for appropriate "legislative, administrative, or other action" at the federal level (*Id.* at 614).

The London Conference also led to President Clinton's and Chancellor Schroeder's negotiated creation of the "Foundation, 'Remembrance, Responsibility and the Future,'" funded by the German government and German corporations to resolve the claims of those who suffered at the hands of German enemy corporations (*Garamendi* at 405). In July 2000, the United States and Germany signed an Executive Agreement on the Foundation, in which the United States agreed to seek legal closure for German companies (*Id.*). Article I of the Agreement expressly stated that the parties intended the Foundation to serve as the exclusive remedy and forum for resolution of all claims against German companies arising out of World War II (*Id.* at 406).

B. Proceedings in the District Court.

In the midst of these wide-ranging diplomatic efforts, plaintiffs initiated this action "to resolve the competing rights to the Ustasha treasury of potentially hundreds of thousands of citizens of various nations" (App. at 89). Based on OFM's alleged complicity in the transfer of looted assets to the Ustashi who fled Croatia after the war, plaintiffs assert claims for conversion, unjust enrichment, restitution, and an accounting against OFM and others (App. at 76-77). Plaintiffs also allege that, because OFM allegedly assisted the war objectives of the Ustasha regime, it should be held accountable for the many human rights violations committed by the Ustasha regime (App. at 76).

The district court dismissed the case as raising a political question under at least two of the alternative formulations set forth in *Baker v. Carr*, 369 U.S. 186 (1962) (App. at 89). Declaring that "the history of the management by the political branches of claims arising out of World War II and the Holocaust reveals a longstanding foreign policy commitment to resolving such claims at the governmental level," the district court held that plaintiffs' claims "have been committed to the political branches for resolution" and, "as such, are not justiciable" (App. at 80, 82-83, 84).

The district court added that there were "'no judicially discoverable and manageable standards' for resolving plaintiffs' claims" because they involve "the undetermined value of property stolen in untold ways in a multiplicity of regions by both military personnel and civilians[,] . . . require a review of materials from a multitude of foreign sources that, 'by sheer bulk alone,' are likely to be unmanageable," and involve "potentially hundreds of thousands of citizens of various nations . . . harmed by the Ustasha regime, both represented and not represented in these proceedings" (App. at 84, 88-89).

C. Proceedings in the Ninth Circuit.

The Ninth Circuit affirmed the district court's judgment in part and reversed in part. The panel unanimously agreed that the political question doctrine barred plaintiffs' claims that the defendants had allegedly assisted the Ustasha's "war objectives" (App. at 51-52, 55). However, the panel was in disagreement over plaintiffs' "property claims," which the majority held were not subject to the political question doctrine (App. at 55).

The majority reasoned that plaintiffs' property claims were similar to suits seeking the return of specific items of property, such as the claim in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (seeking the return of six Klimt paintings from the Austrian Museum) (App. at 31). It conceded that tracing the "fungible assets" of hundreds of thousands of people was "more difficult" than tracing ownership of the six Klimt paintings in *Altmann*, but ruled that modern class action practice would make the case "manageable" (App. at 36, 38). In so doing, the majority disagreed with the D.C. Circuit's decision on similar facts in *Kelberine v. Societe Internationale*, 363 F.2d 989 (D.C. Cir. 1966) (App. at 37).

The dissenting judge relied on this Court's ruling in *American Insurance Ass'n v. Garamendi*, 539 U.S. 396 (2003), which concluded that the authority to settle World War II-related claims resided in the Executive Branch. Judge Trott wrote that the foreign affairs and war powers committed by the Constitution to the political branches included war settlements "for injuries and losses suffered during wartime at the hands of the Nazis and their alleged accomplices" (App. at 60). Judge Trott also disagreed with the majority's view that there were "judicially manageable standards" for resolving claims on such a worldwide scale after half a century:

> What the majority has unintentionally accomplished in embracing this case is nothing less than the wholesale creation of a World Court, an international tribunal with breathtaking and limitless jurisdiction to entertain the World's failures, no matter where they happen, when they happen, to whom they happen, the identity of the wrongdoer, and the sovereignty of one of the parties.

(App. at 68).

REASONS FOR GRANTING THE PETITION

The United States has long demonstrated its commitment to pursuing resolution of Nazi-era claims through carefully negotiated political channels. Plaintiffs' claims for restitution of assets allegedly looted from them and their families by a "Nazi puppet Regime" implicate each of the six categories of non-justiciable claims set forth in *Baker v. Carr*, 369 U.S. 186, 217 (1962), and should, therefore, be dismissed under the political question doctrine. By drawing an arbitrary distinction between what it termed "Property Claims" and "War Objectives Claims," and by failing to distinguish between the Vatican Bank and OFM, the Ninth Circuit's opinion subjects a matter of foreign relations to adjudication in the federal courts. As the dissent correctly recognized, the plaintiffs' "Property Claims," no less than their "War Objective Claims," are " 'inextricably intertwined' with the Executive Branch's powers over war-related crimes, such that the judiciary is powerless to adjudicate them." Review by this Court is warranted.

I. The Ninth Circuit's opinion failed to properly distinguish between the OFM and the Vatican Bank in addressing the applicability of the political question doctrine.

In analyzing the applicability of the political question doctrine, the Ninth Circuit opined that "no distinction can be made [between OFM and the Vatican Bank] on the basis of the pleadings" (App. at 14). The Ninth Circuit then proceeded to distinguish between what it termed the "Property Claims" and "War Objectives Claims," finding only the latter barred by the political question doctrine (App. at 24-25). By failing to distinguish between the two defendants, the Ninth Circuit was able to conclude that plaintiffs' "Property Claims ultimately boil down to whether [both defendants were] wrongfully holding assets" (App. at 32). Scrupulous attention to the specific allegations of the complaint, however, demonstrates that all of the claims against OFM are indistinguishable from what the Ninth Circuit termed "War Objectives Claims," which that court correctly held are barred under the political question doctrine.

Plaintiffs allege that the Ustasha regime, a Nazi puppet government operating under the German protectorate, implemented criminal policies throughout Croatia that mirrored the criminal policies of the Nazi regime (Doc. #65, ¶¶ 43, 46). Like the Nazi regime, the Ustasha utilized forced labor, maintained concentration camps, looted the assets of its victims and "liquidated" members of various ethnic groups, including Jews, Serbs, and Roma (*Id.* at ¶ 46). The profits from these crimes were included in the Ustasha treasury and were used to finance the ongoing war effort (*Id.*).

As the Allied victory drew near, the Ustasha began transferring portions of its treasury to safe havens outside of Croatia. Plaintiffs allege that portions of the treasury

were transferred to the Vatican Bank with the alleged assistance of OFM (*Id.* at ¶ 56). OFM allegedly provided aid to former Ustashi through its Chief Economist, who purportedly provided money laundering services, false identity papers and safe housing in Rome for Ustashi war criminals (*Id.* at ¶ 38). The Vatican Bank then allegedly served as "the principal post-war banker to the Ustasha Government in Exile" and "profited from Ustasha treasury transactions involving banks in various European and South American countries" (*Id.* at ¶ 60). OFM allegedly "reaped similar monetary benefits from their involvement with the Ustasha Treasury" (*Id.*).

The Ninth Circuit drew a distinction between what it termed plaintiffs' "Property Claims," and plaintiffs' "War Objectives Claims." In describing the "Property Claims," the Ninth Circuit noted that plaintiffs allege the Nazi and Ustasha regimes looted assets from the plaintiff class, which assets were included in the Ustasha treasury (App. at 25-26). The court characterized as "garden-variety legal and equitable claims for the recovery of property" plaintiffs' claims that the defendants improperly retained or converted looted assets, that the defendants were unjustly enriched by receiving looted property, that the defendants wrongfully used and profited from the looted property, and seeking the return of all identifiable property looted from the plaintiffs (App. at 25). The Ninth Circuit held the Property Claims did not present a non-justiciable political question (App. at 46).

In contrast, the Ninth Circuit characterized as "War Objectives Claims" those claims arising out of the alleged violation of international law. Among these claims, the Ninth Circuit included claims that the defendants "facilitated and aided and abetted the activities of war criminals," created a "ratline" to help the war criminals escape prosecution, assisted the "Nazi backed Ustasha Regime in

preserving their Treasury," and were unjustly enriched by profits derived from slave labor (App. at 46-47).

Plaintiffs do not allege that OFM holds or ever held any portion of the Ustasha treasury. Rather, plaintiffs allege that OFM facilitated the transfer of these funds to the Vatican Bank. While claims that the Vatican Bank held or continues to hold deposits of Ustasha assets might, arguably, be distinguished from the "War Objectives Claims," claims that OFM allegedly reaped a monetary benefit in some unspecified way from "involvement" with the Ustasha treasury cannot (*see* Doc. #65, ¶ 60).

In holding that the "War Objectives Claims" are non-justiciable, the Ninth Circuit observed that the plaintiffs':

> allegations that the [defendants] violated international law by "creat[ing] a 'ratline' or 'pipeline' to help the war criminal flee from prosecution" could also be levied against the United States, which provided similar aid driven by the sudden shift in priorities from fighting the Nazis to driving back Communism[.]
>
> * * * *
>
> . . . It is not our role to sit in judgment as to whether the perceived Communist threat justified assisting alleged war criminals. Rather, we are mindful of the Supreme Court's admonition that it is up to the political branches to come to terms with these 'delicate [and] complex' foreign policy decisions for which the judiciary has neither aptitude, facilities, nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.'

(App. at 49-50, *quoting Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948)).

The Ninth Circuit further concluded that "[d]etermining whether the Vatican Bank was unjustly enriched by profits derived from slave labor would . . . necessitate that we look behind the Vatican Bank and indict the Ustasha regime for its wartime conduct" (App. at 51). The Ninth Circuit held that adjudication of such claims would require "an initial policy determination of a kind clearly for nonjudicial discretion" (App. at 52). The court concluded that it is not the role of the judiciary "to speak for the U.S Government by declaring that a foreign government is at fault for using forced labor during World War II" (App. 52).

Allegations that OFM assisted war criminals by creating a "ratline" are indistinguishable for purposes of political question analysis from allegations that OFM assisted the same war criminals by facilitating the transfer of the Ustasha treasury out of Croatia. Whether the perceived Communist threat justified the latter form of assistance is equally a question entrusted to the political branches. Likewise, whether OFM is alleged to have benefited from the Ustasha looting of victims' assets is indistinguishable for purposes of the political question doctrine from allegations that the defendants benefited from the Ustasha use of slave labor. Condemnation of the Ustasha regime for either of these wrongs is properly left to the discretion of the political branches.

To suggest that courts should not adjudicate claims for profits derived from forced labor during war but should address wartime claims for profits derived from looted assets draws too fine a distinction. In both instances, the claim is for profits allegedly earned through illegal and immoral acts in furtherance of war objectives. In both instances, resolution of the claims is a matter properly left to the political branches of government.

II. Plaintiff's claims against OFM present non-justiciable political questions under all six formulations set forth in *Baker v. Carr*.

This Court held in *Baker v. Carr* that a case presents a non-justiciable political question under any one of the following circumstances:

> (1) A textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) or a lack of judicially discoverable and manageable standards for resolving it; (3) or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; (4) or the impossibility of a court's undertaking independent resolution without expressing lack of respect due the coordinate branches of government; (5) or an unusual need for unquestioning adherence to a political decision already made; (6) or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The plaintiffs' claims are non-justiciable under all six of these formulations.

A. Resolution of Holocaust-era claims involving confiscation of property is an issue of foreign relations, constitutionally committed to the political branches of government.

The first of the six *Baker v. Carr* formulations directs the Court to search for "a textually demonstrable constitutional commitment" of the issue to the political branches of government. As this Court has recognized, however, "there are few, if any, explicit and unequivocal instances in the Constitution of this sort of textual commitment." *Nixon v. United States*, 506 U.S. 224, 228, 113 S.Ct. 732, 735 (1993). "The courts therefore are usually left to infer

the presence of a political question from the text and structure of the Constitution." *Id.* Thus, although the Constitution does not explicitly refer to a "foreign relations" power, courts have consistently concluded that "the conduct of foreign relations is committed by the Constitution to the political departments of the government, and the propriety of what may be done in the exercise of this political power [is] not subject to judicial inquiry or decision." *United States v. Belmont*, 301 U.S. 324, 328, 57 S.Ct. 758, 759-60 (1937). *Accord American Insurance Ass'n v. Garamendi*, 539 U.S. 396, 414, 123 S.Ct. 2374, 2386 (2003) (noting "the President's 'vast share of responsibility for the conduct of our foreign relations' ").

More particularly, "matters concerning war are part of the inner core" of the foreign relations power. *Deutsch v. Turner*, 324 F.3d 692, 711 (9th Cir. 2003) (noting that seven of the eleven clauses granting foreign affairs powers to the President and Congress address "preparing for war, declaring war, waging war, or settling war"). The courts that have reached this question have, thus, consistently and uniformly held that claims for restitution arising out of the atrocities of World War II are a matter of foreign relations to be resolved by the political branches of government. *Burger-Fischer v. Degussa AG.*, 65 F.Supp.2d 248, 282-85 (D. N.J. 1999); *Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424, 484-86 (D. N.J. 1999). *Accord Garamendi*, 539 U.S. at 421, 123 S.Ct. at 2390 ("Vindicating victims injured by acts and omissions of enemy corporations in wartime is thus within the traditional subject matter of foreign policy").

This Court in *Garamendi* recognized that "the consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions." *Garamendi*, 539 U.S. at 421, 123 S.Ct. at 2390, *citing*

Hearings on H.R. 2693 before the Subcommittee of Government Efficiency, Financial Management and Intergovernmental Realtions of the House Committee on Government Reform, 107th Cong., 2d Sess., 24 (2002) (statement of Ambassador Randolph M. Bell that it is the "policy of the U.S. Government" to resolve matters of Holocaust-era restitution and compensation through dialogue, negotiation, and cooperation); Hearings on the Status of Insurance Restitution for Holocaust Victims and the Heirs before the House Committee on Government Reform 107th Cong., 1st Sess., 77 (2001) (statement of Ambassador J.D. Bindenagel to the same effect). *Accord http://www.state.gov/p/eur/rt/hlcst/c11376.htm* (viewed August 2005) (indicating that the "U.S. believes that negotiation leads to a more rapid payment of benefits to elderly Holocaust victims and their heirs than the continued pursuit of litigation" and "negotiated settlements benefit far more Nazi victims than would litigation").

Indeed, the past decade has brought with it significant diplomatic efforts to finally resolve issues of Holocaust-era restitution and compensation. In December 1997, the United States participated in the London Conference on Nazi Gold. In May 1997, at the request of President Clinton, Under Secretary of State Stuart Eizenstat coordinated a "Preliminary Study on U.S. and Allied Efforts to Recover and Restore Gold and Other Assets Stolen or Hidden by Germany During World War II." *www.state.gov/www/regions/eur/rpt_9705_ng_links.html.* That study was followed in June 1998, by the Eizenstat Report, the full title of which is "U.S. and Allied Wartime and Postwar Relations and Negotiations with Argentina, Portugal, Spain, Sweden, and Turkey on Looted Gold and German External Assets and U.S. Concerns About the Fate of the Wartime Ustasha Treasury." In December 1998, the United States Department of State and the U.S. Holocaust Memorial Museum hosted the Washington

Conference on Holocaust-Era Assets. *See http://www.state.gov/www/regions/eur/wash_conf_material.html* (viewed August 22, 2005) (collecting Department of State statements on the Washington Conference).

The efforts and discussions at the London and Washington Conferences have already borne fruit. The momentum from the two conferences led to the creation of the "Foundation, 'Remembrance, Responsibility and the Future'" and the July 2000 Executive Agreement pertaining to the Foundation. In addition, on June 23, 1998, President Clinton signed into law the U.S. Holocaust Assets Commission Act of 1998 (22 U.S.C. § 1621), which created a presidential advisory commission to study, *inter alia*, the extent to which assets of Holocaust victims came into the possession of the United States Government. That commission released its final report in December 2000. *See http://www.pcha.gov/PlunderRestitution.html/html/Home_Contents.html* (viewed August 22, 2005).

In finding that the issues in this case were not a matter of foreign relations, the Ninth Circuit relied on its belief that no treaty or executive order directly addresses claims with respect to victim assets looted by the Ustasha. The fact that no treaty or executive agreement expressly resolves claims related to the Ustasha treasury does not remove the issue from the sphere of foreign relations. Indeed, as the Ninth Circuit recognized in *Deutsch*, a claim cannot simultaneously be barred by the express terms of a treaty and be a political question. *Deutsch*, 324 F.3d at 713, n. 11. Where the foreign policy determinations of the political branches are embodied in the terms of a treaty, construction of that treaty does not raise a political question. The absence of a specific treaty or agreement establishing a substantive rule with respect to possible claims against OFM simply confirms that the exclusive power of the political branches to resolve this question has

yet to be definitively exercised in a manner enforceable by the court. *See In re Nazi Era Cases Against German Defendants Litig.*, 129 F. Supp. 2d 370, 378 (D. N.J. 2001) ("The question is not whether Plaintiff's claims are barred by treaty, but whether his claims are such that they have been committed to the political branches for resolution. To find that they have not would be to conclude that his claims are somehow distinct from every other type of claim arising out of World War II, and that they have somehow been left open for judicial resolution").

B. The nature of the plaintiffs' claims against OFM is such that judicially discoverable and manageable standards do not exist, the claims cannot be resolved without an initial policy determination of a kind clearly for non-judicial discretion, and adjudication would express a lack of respect due the political branches of government.

The second, third and fourth formulations of *Baker v. Carr* also apply and show that this case presents a non-justiciable political question. According both to plaintiffs' complaint and to the Eizenstat Report, the treasury of the Croatian Ustasha likely included assets looted from its victims, though the proportion is unknown (Doc. #65 at ¶ 49; Eizenstat Report at 143). The looted assets were allegedly taken from victims in the Ukraine, Belarus, Russia, Croatia and Bosnia, both in concert with and with the approval of Nazi Germany (Doc. #65 at ¶ 48). In the face of the Allied victory, the Ustasha began moving portions of its treasury out of Yugoslavia into accounts in the Swiss National Bank, the Vatican Bank, and other "banks in various European and South American countries" (*Id* at ¶¶ 57-61). The OFM is a religious order, not a banking institution, and is not alleged to hold any portion of the Ustasha treasury. Rather, plaintiffs allege

that OFM assisted in facilitating this transfer of Ustasha funds into the Vatican Bank and have "reaped . . . monetary benefits from their involvement with the Ustasha Treasury" (*Id.* at ¶ 60). Plaintiffs seek an accounting of these profits and damages under theories of conversion, unjust enrichment and restitution.

No discoverable or manageable judicial standards exist for resolution of such claims. This case does not involve the restoration of an identifiable *res* to a particular identifiable owner. The potential claimants here include an estimated 300,000 victims of the Ustasha regime. As the district court recognized, "plaintiffs do not seek recovery of money and assets withheld from specific accounts but, rather, the undetermined value of property stolen in untold ways in a multiplicity of regions by both military personnel and civilians" (App. at 88-89). Plaintiffs seek recovery from the OFM, not out of a clearly identifiable deposit of Ustasha funds held in identifiable accounts, but from undetermined "monetary benefits" plaintiffs believe OFM received through their alleged "involvement" with the Ustasha treasury (Doc. #65, ¶60).

The immense evidentiary burden facing the plaintiffs in this case cannot be overstated. Plaintiffs will be required to assemble evidence more than a half-century old involving the covert activities of a fascist puppet regime. They will need to somehow value the property and assets looted in innumerable ways from countless victims in a multiplicity of regions by a variety of Ustasha actors. They will need to somehow trace the disposition of those assets across numerous national borders—a task that has eluded even the United States government, despite this nation's immense resources and intelligence capabilities. Courts have held such insurmountable evidentiary hurdles to be a proper consideration in determining whether judicially manageable standards exist. *Kelberine v. Societe Internationale*, 363 F.2d 989, 993 (D.C. Cir. 1966); *In re*

African-American Slave Descendants Litigation, 375 F.Supp.2d 721, 762-63 (N.D. Ill. 2005) ("issues that may appear to be capable of judicial resolution in an ordinary case move beyond the province of this court given the magnitude of the events that preceded them").

Even more daunting than the evidentiary hurdles, however, are the purely legal challenges involved in any attempt to fashion appropriate relief in such a case. Should plaintiffs somehow manage to demonstrate the value of the Ustasha treasury, the proportion thereof composed of looted assets, the ultimate disposition of those assets, and the degree to which OFM is alleged to have benefited, plaintiffs will still be required to demonstrate some legal standard for determining the proper measure of damages to be afforded individual plaintiffs arising from OFM's alleged conduct. In *Burger-Fischer*, the court cogently observed:

> Wrongs were suffered not only by the classes of persons represented in these proceedings . . . but also by many other classes of persons in many lands. They, too, had claims against German assets. By what conceivable standard could a single court arrive at a fair allocation of resources among all deserving groups? By what practical means could a single court acquire the information to fashion such a standard?

Burger-Fischer, 65 F.Supp.2d at 284.

Likewise, the plaintiffs in the present case were by no means the only victims of the Ustasha regime. Numerous victims and their descendants, scattered throughout the world, have equally meritorious claims against whatever might remain of the Ustasha treasury. Moreover, OFM is not alleged to hold any portion of that treasury, but only some unspecified "monetary benefits" allegedly received not only for assisting with the transfer of Ustasha funds but also for allegedly aiding the escape of Ustasha war

criminals through the "ratline." Plaintiffs' claims for damages based on activities related to the ratline have already been dismissed as non-justiciable. Even if the amount of OFM's alleged profits could be determined, by what practical means could a single court determine the amount of this sum attributable to "involvement" with the Ustasha treasury as compared to the amount attributable to assisting the flight of alleged war criminals or derived from the alleged use of slave labor? By what conceivable standard could a court arrive at a fair allocation of these profits among all deserving groups, including both the individuals and nations wronged by the Ustasha regime?

Resolution of questions such as these would require an initial policy determination of the sort clearly entrusted to the discretion of the political branches. Indeed, the political branches of government have long been engaged in resolving the difficult, often intractable, questions of fairly allocating appropriate reparations for Holocaust-era injuries among the countless deserving claimants in a manner that best preserves the foreign policy interests of the nation. This long and laborious process began with the Yalta and Potsdam Conferences and the Paris Treaty, which followed shortly thereafter. The process continued through adoption of the Treaty of Peace with Italy and the London Debt Agreement. That the process remains ongoing, even now more than a half-century after the war, as demonstrated by the 1997 London Conference, the 1998 Washington Conference, and the creation of a Presidential Advisory Commission on Holocaust Assets in the United States. These ongoing efforts have given birth to several new treaties addressing Holocaust-era insurance claims.

To date, the ongoing diplomatic efforts have not conclusively resolved all of the issues surrounding restitution of private property looted during the war. While it is easy to sympathize with plaintiffs' impatience at the pace of

diplomatic progress, the judiciary may not supplant the role of the political branches based on a judgment that the political process is moving too slowly. As the *Iwanowa* court observed, "[c]ourts may not pass judgment upon the political negotiations of the executive branch and the international community" because "[s]uch intrusion into the realm of foreign policy would undermine the executive branch's sole discretion in the field of international relations." *Iwanowa*, 67 F.Supp.2d at 487, *quoting U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320, 57 S.Ct. 216, 221 (1936). Particularly in light of the substantial, ongoing diplomatic discourse on the issue of Holocaust-era assets, judicial adjudication of the present case would express a lack of respect due the diplomatic efforts of the executive branch.

C. The Court must adhere to political decisions already made because to do otherwise risks potential embarrassment to the political branches of the United States government.

This case also presents a non-justiciable political question because it implicates the fifth and sixth formulations of *Baker v. Carr*. In *Garamendi*, this Court recognized the political decision already made by the executive branch with respect to the resolutions of claims arising out of World War II: "consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions." *Garamendi*, 539 U.S. at 421, 123 S.Ct. at 2390. The lower courts have made similar observations. *Deutsch*, 324 F.3d at 712-13 ("The United States has already exercised its own exclusive authority to resolve the war, including claims arising out of it"); *Iwanowa*, 67 F.Supp.2d at 486 ("The executive branch has always taken the position that claims arising out of World War II must

be resolved through government-to-government negotiations").

Judicial resolution of plaintiffs' claims would cause potential embarrassment because it would be inconsistent with the executive branch's consistent policy to address claims arising out of World War II through diplomacy rather than litigation.

The *Burger-Fischer* court poignantly observed: "Every human instinct yearns to remediate in some way the immeasurable wrongs inflicted upon so many millions of people" during World War II. *Burger-Fischer*, 65 F.Supp.2d at 285. Few moments in history, if any, strike so deep and meaningful an emotional chord. The delicate work of balancing the nation's relationships in the world against the longing to right the wrongs of a half-century past is a task appropriately pursued by the political branches of government, not by the judiciary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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UNITED STATES COURT OF APPEALS OR THE NINTH CIRCUIT

No. 03-15208

D.C. No. CV-99-04941-MMC

EMIL ALPERIN; JEWGENIJA ROMANOVA; MARIA DANKEWITSCH; VLADIMIR MORGUNOV, on behalf of themselves and all other persons similarly situated; ORGANIZATION OF UKRAINIAN ANTIFASCIST RESISTANCE FIGHTERS; UKRAINIAN UNION OF NAZI VICTIMS AND PRISONERS; VLADIMIR BRODICH; WILLIAM DORICH; IGOR NAJFELD, on behalf of themselves and all other persons similarly situated; LJZABETH LALICH; MLADEN DJURICICH; ROBERT PREDRAG GAKOVICH; NEVENKA VUKASOVIC MALINOWSKI; ELI ROTEM; MILORAD SKORIC; VELJKO MILJUS; FRED ZLATKO HARRIS; MILJA CONGER; ALLEN DOLFI HERSKOVICH; BOGDAN KLJAIC; DAVID LEVY; ZDENKA BAUM RUCHWARGER; VLADAN CELEBONOVIC; DESA TOMASEVIC WAKEMAN; DANIEL PYEVICH; KOVILJKA POPOVIC; JASENOVAC RESEARCH INSTITUTE; THE INTERNATIONAL UNION OF FORMER JUVENILE PRISONERS OF FASCISM OF UKRAINE, RUSSIA, AND BELARUS, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

VATICAN BANK, aka Institute of Religious Works aka Instituto per le Opere Di Religione (IOR); FRANCISCAN ORDER (OFM), INCLUDING CROATIAN FRANCISCANS; CROATIAN COFRATERNITY OF THE COLLEGE OF SAN GIROLAMO DEGLI ILLIRICI, and its successors, Swiss, Austrian, Argentine, Spanish, Italian, Portuguese,

Vatican & German Banking Institutions; CROATIAN LIBERATION MOVEMENT (HOP),

Defendants-Appellees.

No. 03-16166

D.C. No. CV-99-04941-MMC

EMIL ALPERIN; JEWGENIJA ROMANOVA; MARIA DANKEWITSCH; VLADIMIR MORGUNOV, on behalf of themselves and all other persons similarly situated; ORGANIZATION OF UKRAINIAN ANTIFASCIST RESISTANCE FIGHTERS; UKRAINIAN UNION OF NAZI VICTIMS AND PRISONERS; VLADIMIR BRODICH; WILLIAM DORICH; IGOR NAJFELD, on behalf of themselves and all other persons similarly situated; LIZABETH LALICH; MLADEN DJURICICH; ROBERT PREDRAG GAKOVICH; NEVENKA VUKASOVIC MALINOWSKI; ELI ROTEM; MILORAD SKORIC; VELJKO MILJUS; FRED ZLATKO HARRIS; MILJA CONGER; ALLEN DOLFI HERSKOVICH; BOGDAN KLJAIC; DAVID LEVY; ZDENKA BAUM RUCHWARGER; VLADAN CELEBONOVIC; DESA TOMASEVIC WAKEMAN; DANIEL PYEVICH; KOVILJKA POPOVIC; JASENOVAC RESEARCH INSTITUTE; THE INTERNATIONAL UNION OF FORMER JUVENILE PRISONERS OF FASCISM OF UKRAINE, RUSSIA, AND BELARUS, on behalf of themselves and all others similarly situated; ORGANIZATION OF UKRAINIAN ANTIFASCIST RESISTANCE FIGHTERS; UKRAINIAN UNION OF NAZI VICTIMS AND PRISONERS,

Plaintiffs-Appellants,

v.

VATICAN BANK, aka Institute of Religious Works aka Instituto per le Opere Di Religione (IOR); FRANCISCAN ORDER (OFM), INCLUDING CROATIAN FRANCISCANS; CROATIAN COFRATERNITY OF THE COLLEGE OF SAN GIROLAMO DEGLI ILLIRICI, and its successors, Swiss, Austrian, Argentine, Spanish, Italian, Portuguese, Vatican & German Banking Institutions; CROATIAN LIBERATION MOVEMENT (HOP),

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of California
Maxine M. Chesney, District Judge, Presiding

A gued and Submitted
October 7, 2004—San Francisco, California

Filed April 18, 2005
Amended June 9, 2005

Before: Stephen S. Trott, M. Margaret McKeown,Circuit Judges, and Milton I. Shadur, Senior Judge.*

Opinion by Judge McKeown
Partial Concurrence and Partial Dissent by Judge Trott

COUNSEL

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Jeffrey S. Lena, Berkeley, California; Paul E. Vallone,

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* The Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

Hinshaw & Culbertson, San Francisco, California, for the defendants-appellees.

OPINION

McKEOWN, Circuit Judge:

We are faced here with the question whether claims for losses allegedly suffered at the hands of a Nazi puppet regime during World War II are cognizable in our courts today. Because these claims, at least superficially, touch on foreign relations and potentially controversial political issues, it is tempting to jump to the conclusion that such claims are barred by the political question doctrine. The Supreme Court has counseled, however, that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962). The justiciability inquiry is limited to " 'political questions,' not . . . 'political cases,' " *id.* at 217, and should be made on a "case-by-case" basis, *id.* at 211.

Although the political question doctrine often lurks in the shadows of cases involving foreign relations, it is infrequently addressed head on. *See, e.g.*, *Hwang Geum Joo v. Japan*, 332 F.3d 679, 682 (D.C. Cir. 2003), *vacated and remanded by* 124 S. Ct. 2835 (2004) (explaining that because the district court did not have subject matter jurisdiction in case involving World War II-era claims against Japan, "[n]or . . . need we consider whether the political question doctrine would also bar its adjudication"). The procedural posture of this case, however, places the issue squarely before us.

With these principles in mind, in determining the threshold issue of justiciability, we scrutinize each claim individually. Indeed, in our system of separation of powers, we should not abdicate the court's Article III responsibil-

ity—the resolution of "cases" and "controversies"—in favor of the Executive Branch, particularly where, as here, the Executive has declined a long-standing invitation to involve itself in the dispute. We conclude that some of the claims are barred by the political question doctrine and some of the claims are justiciable. Although the parties have multiple procedural and substantive challenges to overcome down the road, they are entitled to their day—or years—in court on the justiciable claims.

A group of twenty-four individuals and four organizations (the "Holocaust Survivors") claim that the Vatican Bank, known by its official title *Istituto per le Opere di Religione*, the Order of Friars Minor, and the Croatian Liberation Movement (*Hrvatski Oslobodilacki Pokret*), profited from the genocidal acts of the Croatian Ustasha political regime (the "Ustasha"), which was supported throughout World War II by Nazi forces. That profit allegedly passed through the Vatican Bank in the form of proceeds from looted assets and slave labor. The Holocaust Survivors brought suit in federal court claiming conversion, unjust enrichment, restitution, the right to an accounting, and human rights violations and violations of international law arising out of the defendants' alleged involvement with the Ustasha during and following World War II.

The Vatican Bank and the Order of Friars Minor moved to dismiss the Holocaust Survivors' complaint on multiple grounds; by agreement of the parties the district court limited its discussion to the issue of whether the Holocaust Survivors' claims should be dismissed under the political question doctrine. The district court reasoned that the political question doctrine bars consideration of the merits of the claims in their entirety. The district court dismissed the action against the Croatian Liberation Movement, which never appeared in the action, on the grounds that the claims were barred by both the political question

doctrine and the lack of personal jurisdiction over this defendant. We reverse in part because certain of the Holocaust Survivors' claims—those with respect to lost and looted property (conversion, unjust enrichment, restitution, and an accounting)—are not barred by this doctrine. In contrast, the broad human rights allegations tied to the Vatican Bank's alleged assistance to the war objectives of the Ustasha present nonjusticiable controversies. Like the district court, we hold that the court did not have personal jurisdiction over the Croatian Liberation Movement.[1] Consequently, we see no reason to reach the political question doctrine vis-à-vis this defendant.

Bearing in mind that "[t]he decision to deny access to judi-cial relief is not one we make lightly," *Liu v. Republic of* China, 892 F.2d 1419, 1433 (9th Cir. 1989) (quoting *Int'l Ass'n of Machinists & Aerospace Workers v. OPEC*, 649 F.2d 1354, 1360 (9th Cir. 1981)), we conclude that the political question doctrine does not create an absolute barrier to the Holocaust Survivors' property claims. To conclude otherwise would be to shirk our judicial role as "[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 409 (1990).

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[1] Even though a plaintiff need make only a prima facie showing of jurisdiction at this stage in a litigation, *Glencore Grain Rotterdam B.V. v. Shiv-nath Rai Harnarain Co.*, 284 F.3d 1114, 1119 (9th Cir. 2002), the Holocaust Survivors' bare-bones assertions that the Croatian Liberation Movement has been "active" within the United States at some point and at least a few members have ties to this country are insufficient for us to conclude that the exercise of jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washing-ton*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

That said, it bears noting that our initial determination of justiciability in no way reflects any judgment on the threshold legal hurdles that must be overcome or the merits of the claims. Much of the dissent focuses on downstream issues related to potential procedural and substantive pitfalls of the claims. We do not discount the difficulties that may lie ahead; however, consideration of those issues is premature. Given the passage of time, the generality of the allegations, the question of the applicability of the Foreign Sovereign Immunities Act, intricacies of the alleged claims, the class certification issues, whether the claimants have a cognizable legal claim, and a myriad of other procedural and jurisdictional hurdles, the Holocaust Survivors may indeed face an uphill battle in pursuing their claims. But this spectre of difficulty down the road does not inform our justiciability determination at this early stage of the proceedings.

Our conclusion is rooted in the principles of *Baker v. Carr*. Despite the dissent's cataclysmic and speculative projections about the sweep of our opinion, our decision boils down to letting the common law property claims proceed to the next stage and foreclosing the political, human rights, and war-related claims. In so doing, we respect the limits of our jurisdiction as a national court, recognize the role of the Executive in foreign relations, and stick to our role of interpreting the law.

I. BACKGROUND

A. WORLD WAR II AND THE USTASHA TREASURY

The events at issue relate back to the actions of the Vatican during and in the years following World War II.[2]

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[2] Regarding terminology, the Vatican City and the Holy See are

(continued...)

Following Germany's blitzkrieg through Yugoslavia in 1941, a government composed of members of the Ustasha was proclaimed the head of a protectorate of Italy. *See* Ustasha Treasury Report[3] at 141. The Ustasha regime was

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[2] (...continued)
closely related but not interchangeable entities:

> The term "Holy See" refers to the composite of the authority, jurisdiction, and sovereignty vested in the Pope and his advisers to direct the worldwide Roman Catholic Church. . . . . Created in 1929 to provide a territorial identity for the Holy See in Rome, the State of the Vatican City is a recognized national territory under international law. The Holy See, however, enters into international agreements and receives and sends diplomatic representatives.

See U.S. Dep't of State, Background Note: The Holy See (Oct. 2004), *available at* http://www.state.gov/r/pa/ei/bgn/3819.htm ("Vatican Back-ground Note"). *See generally* Robert John Araujo, *The International Personality and Sovereignty of the Holy See*, 50 Cath. U. L. Rev. 291 (2001) (providing historical overview of the Holy See's foreign relations and arguing that it is a subject of international law). These nuances are not critical for purposes of this opinion. Therefore, for convenience, the term "Vatican" will be used to refer generally to the Catholic leadership cen-tered in the Vatican City.

[3] In the late 1990s, the U.S. Government prepared a report on the Ustasha wartime treasury as part of a larger effort "to confront the largely hidden history of Holocaust-related assets after five decades of neglect." Bureau of Public Affairs, U.S. Dep't of State, Pub. No. 10557, U.S. Allied Wartime and Postwar Relations and Negotiations With Argentina, Portugal, Spain, Sweden, and Turkey on Looted Gold and German External Assets and U.S. Concerns About the Fate of the Wartime Ustasha Treasury, Supplement to the Preliminary Study on U.S. and Allied Efforts to Recover and Restore Gold and Other Assets (continued...)

supported throughout World War II by German and Italian occupation forces. *Id.*

Although the United States and its allies were aware to some extent of the Ustasha's atrocities, "It is not clear if the Allied leaders clearly grasped that as many as 700,000 victims, most of them Serbs, had been killed at the Ustasha death camps . . . ." *Id.* at 142. The State Department's report describes the Vatican's role in less generous terms: "The Vatican, which maintained an 'Apostolic visitor' in Zagreb from June 1941 until the end of the War, was aware of the killing campaign . . . . Croatian Catholic authorities condemned the atrocities committed by the Ustashi, but remained otherwise supportive of the regime." *Id.* at 143.

The connections between the Vatican and the Ustasha reportedly continued in the years following World War II:

> With the defeat in May 1945 of Hitler and his satellites, including puppet Croatia, the leaders of the Ustasha fled to Italy, where they found sanctuary at the pontifical College of San Girolamo in Rome. This College was most likely funded at least in part by the remnants of the Ustasha treasury, and appeared to operate with at least the tacit acquiescence of some Vatican officials.

Id. at xviii. It is unclear to what extent the Vatican was aware of these activities, but the State Department is dubious that they were oblivious to the Ustasha's presence:

> Although no evidence has been found to directly implicate the Pope or his advisers in the postwar

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[3] (...continued)
Stolen or Hidden by Germany During World War II iii (1998) ("Ustasha Treasury Report").

> activities of the Ustasha in Italy, it seems unlikely that they were entirely unaware of what was going on. Vatican authorities have told us they have not found any records that could shed light on the Ustasha gold question.

Id. at 156.

The size and nature of the Ustasha treasury remains in considerable doubt. According to the State Department, "The figure of 350 million Swiss francs (over $80 million) of Ustasha gold that U.S. intelligence reported in 1946 remains the only attempt to estimate the total financial resources available to the Ustashi at the end of World War II." *Id.* at 150. The State Department cautions that this estimate "remains unsubstantiated and may not include some or all of the sums reported elsewhere." *Id.*

B. THE HOLOCAUST SURVIVORS' CLAIMS

This background section on the claims is drawn from the Holocaust Survivors' Third Amended Class Action Complaint (the "Complaint"), which is detailed and lengthy and references a number of outside sources, such as the Ustasha Treasury Report. At this stage of the proceedings, we accept the allegations as true. *See California v. United States*, 104 F.3d 1086, 1089 (9th Cir. 1997) (when reviewing a district court's grant of a motion to dismiss, this court accepts the facts alleged in the complaint as true).

1. PLAINTIFFS

The Complaint was filed on behalf of the named plaintiffs and the following class:

> [A]ll Serbs, Jews, and former Soviet Union citizens (and their heirs and beneficiaries), who suffered physical, monetary and/or property losses includ-

> ing slave labor, due to the systematic and brutal extermination of Jews, Serbs, and Romani by the [Ustasha], and as a result of the occupation of the former Soviet Union by Croatian military forces in concert with their German occupation forces.

The potential class is massive: Plaintiff Ukrainian Union of Nazi Victims And Prisoners "represents over 300,000 former slave and forced laborers, prisoners, concentration camp, and ghetto survivors." The geographic scope of the class is also far reaching with the Ustasha's destruction extending beyond Croatia to Bosnia, Yugoslavia, and the Soviet Union, including Ukraine, Belarus, and Russia.

The jurisdictional bases of the Holocaust Survivors' claims are similarly expansive. They claim jurisdiction pursuant to the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605 ("FSIA"), 28 U.S.C. § 1331, federal common law as it incorporates custom-ary international law and treaties, diversity jurisdiction, and California state law.[4]

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[4] The viability of the Holocaust Survivors' claims apart from the issue of the political question doctrine is not before us. Nevertheless, looking ahead, we note that the statutory grounds on which the Holocaust Survivors base their claims have, for the most part, not fared well in recent litigation. Just last term, the Supreme Court limited the ATS in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2764 (2004) (curtailing the scope of actionable international norms under the ATS but explaining that "the door is still ajar subject to vigilant doorkeeping"); *see also Weiss v. Am. Jewish Comm.*, 335 F. Supp. 2d 469 (S.D.N.Y. 2004) (dismissing claim under the ATS for injunctive relief in connection with the construction of a Holocaust memorial in light of the Court's holding in *Sosa*). The contours of the FSIA have also changed with the Supreme Court's holding in *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S. Ct. 2240 (2004), that the FSIA applies retroactively. *See also Abrams v. Societe Nationale des*

(continued...)

2. DEFENDANTS

The Complaint does not name the Vatican itself as a defendant but rather focuses on a closely related entity, the Vatican Bank.[5] The exact relationship between the Vatican and the Vatican Bank is less than clear at this stage of the proceedings. We are in no position to make a substantive judgment about the nature of the Vatican Bank.[6] The Complaint, which we accept at face value,

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[4] (...continued)
Chemins de Fer Francais, 389 F.3d 61, 64-65 (2d Cir. 2004) (dismissing case for lack of subject matter jurisdiction because the French government's acquisition of defendant railroad company immunized it from suit under the FSIA). In *Deutsch v. Turner Corp.*, 324 F.3d 692, 719 (9th Cir. 2003), we held that a California statute on which the Holocaust Survivors' claims are based in part, Cal. Civ. Proc. Code § 354.6, unconstitutionally intruded on the foreign affairs power of the federal government. We leave the district court to determine in the first instance to what extent the Holocaust Survivors have correctly invoked these and other jurisdictional bases.

[5] The Complaint also names "Unknown Catholic Religious Orders," a number of banking institutions (both named institutions and "Does #1-100") and "unknown recipients of Nazi and Ustasha loot" as defendants. The Holocaust Survivors voluntarily dismissed their claims against defendant Swiss National Bank in 2002.

[6] Like its other ominous projections, the dissent jumps ahead to conclude that this suit is "functionally" against "the Vatican itself" and "the Vatican Bank, which is an instrumentality of the sovereign state of the Vatican," and possibly even the Pope. Dissent at 6705. But we are nowhere near the point of making such an assessment. Because this case comes to us at the motion to dismiss stage, we must accept the Complaint's demarcation between the Vatican Bank, which is named as a defendant, and the Vatican, which is not named as a defendant. Further, the
(continued...)

distinguishes between the two entities. The Vatican Bank has its principal place of business in the Vatican City and is headed by a Bishop, but it conducts transactions worldwide including "for-profit merchant banking transactions in the United States, California, and elsewhere."

The actual dealings of the bank, however, are murky. Indeed, the Vatican Bank's holdings and its specific transactions are opaque. In his declaration in support of the Holocaust Survivors' motion for early jurisdictional discovery, John Loftus—a former prosecutor with the U.S. Department of Justice's Nazi-hunting unit—attests, "The Vatican Bank is one of the most secretive financial institutions in the world. The exact nature and ownership of the Vatican Bank is difficult to ascertain owing to the secrecy surrounding it."

The bank's dealings and ownership may be shrouded in mystery, but the Vatican considers itself to have a stake in the outcome of these proceedings. In specific reference to this case, the Vatican's Secretariat of State sent a Verbal Note of Protest, dated October 23, 2000, to the U.S. Embassy in Rome requesting as follows:

> Basing itself upon the diplomatic relations which exist between the United States of America and the Holy See, as well as the recognition which the Government of the United States has accorded to the sovereignty of the Holy See and of Vatican City State, the Secretariat of State requests the inter-

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[6] (...continued)
potential overtones that this case may have on relations with the Vatican leadership do not, as the dissent suggests, warrant dismissal. *See Antolok v. United States*, 873 F.2d 369, 392 (D.C. Cir. 1989) (Wald, C.J., concurring in judgment only) ("I read [*Baker v. Carr*] as a reminder that our focus should be on the particular issue presented for our consideration, not the ancillary effects which our decision may have on political actors.").

vention of the Federal Government of the United States of America.

The Order of Friars Minor joined the Vatican Bank in bringing the motion to dismiss. A religious brotherhood founded by St. Francis Assisi, the organization includes "several Croatian Franciscan Orders in California, the United States, Croatia, and Italy." During World War II, "Many high officials of the Ustasha government were Roman Catholic clergy and, in particular, Franciscans." These ties continued after the war with the Order of Friars Minor providing aid to former Ustasha.

Neither the district court nor the Holocaust Survivors distinguished between the Vatican Bank and Order of Friars Minor in the treatment of the political question doctrine. Likewise, because no distinction can be made on the basis of the pleadings, we also address the two defendants together. For ease of reference, from this point on in the opinion we refer to them collectively as the "Vatican Bank."

The third defendant, the Croatian Liberation Movement, is identified "as the successor to the Ustasha government." The Croatian Liberation Movement allegedly "functioned as a government in exile and coordinated terrorist activities in the United States and elsewhere."

3. CAUSES OF ACTION

The Complaint describes in detail the atrocities inflicted on the Holocaust Survivors during World War II by the Ustasha and, more generally, by allied Fascists "believed to be Croatians." In addition to describing the looting of assets, the Complaint recites genocidal acts of the Ustasha, including those carried out at the "Jasenovac Concentration Camp complex, termed by historians as the 'Auschwitz of the Balkans.' "

Upon the collapse of the Ustasha regime in 1945, the Holocaust Survivors maintain that "all or a portion of the Ustasha Treasury was transferred to cooperative Roman Catholic clergyman [sic] and Franciscans for transport to Rome where Franciscans sympathetic to the Ustasha were based." These funds eventually found their way into the hands of the Vatican Bank, among other recipients. As alleged in the Complaint, "A 1948 U.S. Army Intelligence reports [sic] confirmed 2,400 kilos of Ustasha stolen gold were moved from the Vatican to one of the Vatican's secret Swiss bank accounts." In the decades following World War II, the Holocaust Survivors con-tend that the Vatican Bank and the Croatian Liberation Movement continued to profit from transactions involving the Ustasha treasury.

Having set forth these general allegations, the Complaint advances five causes of action:

Conversion: The Holocaust Survivors first allege, "Defendants . . . have willfully and wrongfully misappropriated and

converted the value of [property taken from the Holocaust Survivors] and its derivative profits into their own property."

Unjust Enrichment: Second, defendants were unjustly enriched by "receiv[ing] stolen property given to them by members of the Ustasha Regime, which rightfully belongs to [the Holocaust Survivors], as well as the value of slave labor performed."

Restitution: The Holocaust Survivors allege in their third claim that their "goods and property have been taken, thus denying [them] the use and enjoyment thereof; Defendants have wrongfully used and profited from that property." Maintaining that "compensation in damages is inadequate in that the property taken cannot be replaced and the harm inflicted cannot be undone by mere compen-

sation," the Holocaust Survivors call for "equitable remedies."

Accounting: Fourth, the Holocaust Survivors request "the equitable remedy of accounting," alleging that "Defendants have never accounted for or paid the value of Plaintiffs' prop-erty or the profits which Defendants have derived from that property, either during World War II or since World War II ended."

Human Rights Violations and Violations of International Law: Finally, the Holocaust Survivors allege:

> Defendants participated in the activities of the Ustasha Regime in furtherance of the commission of war crimes, crimes against humanity, crimes against peace, torture, rape, starvation, physical and mental abuse, summary execution and genocide. Specifically, the actions and conduct of Defendants, in addition to being profitable, actively assisted the war objectives of the Ustasha Regime.

The Complaint condemns the defendants' aiding and abetting of war criminals after World War II by helping them to evade prosecution and to preserve the Ustasha treasury.

The Holocaust Survivors cite a multitude of legal bases for these claims: "Defendants' actions were in violation of numerous international treaties and the fundamental human rights laws prohibiting genocide, war crimes, crimes against humanity and crimes against peace. Defendants' actions vio-lated customary international law . . . ." They also claim that "Defendants committed torts under the laws of the United States, requiring Defendants to pay . . . appropriate compensa-tory and punitive damages for . . . injuries and losses."

C. OVERVIEW OF THE POLITICAL QUESTION DOCTRINE

Our inquiry proceeds from the age-old observation of Chief Justice Marshall that "[q]uestions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803). Although the principle behind the political question doctrine was announced over two hundred years ago in *Marbury*, the Supreme Court has addressed the doctrine in surprisingly few cases. *See Atlee v. Laird*, 347 F. Supp. 689, 693-703 (E.D. Pa. 1972) (three-judge court), *aff'd sub nom. mem.*, *Atlee v. Richardson*, 411 U.S. 911 (1973), (detailed "case by case" analysis of the development of the doctrine).

[1] In the landmark case of *Baker v. Carr*, the Supreme Court provided its most comprehensive discussion on the application of the doctrine. Recognizing that the attributes of the political question doctrine "diverge, combine, appear, and disappear in seeming disorderliness" in various settings, the Court set out to illuminate the "contours" of the doctrine. 369 U.S. at 210-11; *see also* Erwin Chemerinsky, Constitutional Law: Principles and Policies § 2.8.1 (1997) ("In many ways, the political question doctrine is the most confusing of the justiciability doctrines."). The Court explained that the political question doctrine has its roots in the separation of powers and set forth six formulations for courts to consider in determining whether they should defer a case to the political branches:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility

> of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

369 U.S. at 217.

[2] Dismissal on the basis of the political question doctrine is appropriate only if one of these formulations is "inextricable" from the case. *Id.* Although termed as "formulations" in *Baker*, the plurality in *Vieth v. Jubelirer*, 541 U.S. 267, 124 S. Ct. 1769, 1776 (2004), recently described these criteria as "six independent tests." But these tests are more discrete in theory than in practice, with the analyses often collapsing into one another. *See Nixon v. United States*, 506 U.S. 224, 228-29 (1993) (describing interplay between the first and second *Baker* tests). This overlap is not surprising given the common underlying inquiry of whether the very nature of the question is one that can properly be decided by the judiciary.

Addressing foreign affairs specifically, *Baker* cautioned against "sweeping statements" that imply all questions involving foreign relations are political ones. 369 U.S. at 211 (citing *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the pro-priety of what may be done in

the exercise of this political power is not subject to judicial inquiry or decision.")). Instead, the Court instructed that courts should undertake a discriminating case-by-case analysis to determine whether the question posed lies beyond judicial cognizance. 369 U.S. at 211. Informing this inquiry are considerations of "the history of [the question's] management by the political branches," its "susceptibility to judicial handling," and "the possible consequences of judicial action." *Id.* at 211-12.

Despite this caution that it is impossible to decide cases raising the political question doctrine "by any semantic cataloguing," *id.* at 217, certain families of cases have emerged in the foreign affairs realm. *See, e.g., Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 229-31 (1986) (interpretation of statutes involving foreign affairs is a justi-ciable question); *Goldwater v. Carter*, 444 U.S. 996, 1002-04 (1979) (four-justice plurality concluding that a challenge to the President's unilateral termination of a treaty presents a political question); *Ludecke v. Watkins*, 335 U.S. 160, 168 (1948) (termination of war is a political question); *Oetjen*, 246 U.S. at 302 (Executive's recognition of a foreign government is a political question). In general, however, *Baker*'s admoni-tion has proved true that most cases involving foreign affairs fail to fall neatly into categories on one side or the other of the justiciable/nonjusticiable line. As a result, the overarching *Baker* tests remain the starting point of our inquiry.

Following *Baker*, the Supreme Court has not retreated from the analytical framework it established. *See Vieth*, 124 S. Ct. at 1776 (reiterating *Baker* formulations); *Davis v. Bandemer*, 478 U.S. 109, 121-27 (1986) (reciting *Baker* formulations and declining Justice O'Connor's implicit invitation to rethink that approach). Subsequent decisions have elaborated on the various criteria. In particular, the *Vieth* plurality's observation that the *Baker* tests "are

probably listed in descending order of both importance and certainty," 124 S. Ct. at 1776, is borne out by the disproportionate emphasis on the first two tests in both Supreme Court and lower court cases. *See, e.g.*, *Powell v. McCormack*, 395 U.S. 486, 548-49 (1969) (dismissing five *Baker* formulations as inapplicable in two paragraphs after an extensive discussion of the first test); *see also El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1367 (Fed. Cir. 2004) (focusing on first *Baker* formulation in holding that the Constitution, "in its text and by its structure, commits to the President the power to make extraterritorial enemy property designations"); *Made in the USA Found. v. United States*, 242 F.3d 1300, 1312-19 (11th Cir. 2001) (briefly addressing "prudential considerations" after analyzing the first and second *Baker* formulations at length in concluding that the question of what constitutes a treaty is a political question); *In re African-American Slave Descendants Litig.*, 304 F. Supp. 2d 1027, 1056-63 (N.D. Ill. 2004) (discussing first and second *Baker* formulations extensively in determining that slave reparation claims were not justiciable). *But see United States v. Munoz-Flores*, 495 U.S. 385, 390-93 (1990) (briefly dismissing other *Baker* formulations after explaining that mere judicial scrutiny of a congressional enactment does not show a lack of respect for Congress under the fourth *Baker* formulation). Similarly, the district court in this case addressed only the first and second considerations and found that both counseled in favor of dismissal.

Perhaps not surprisingly, our analysis also focuses on the first two considerations because they are the most significant in the face of the specific allegations of the Complaint. Before we proceed to evaluate the Holocaust Survivors' claims, it is useful to take a short detour through the World War II Holocaust claims cases as they pertain to the political question doctrine.

D. THE POLITICAL QUESTION DOCTRINE AND WORLD WAR II-ERA CLAIMS

The late 1990s saw a flurry of legal activity over Holocaust-era claims after years of quietude. *See* Michael J. Bazyler, *Nuremberg in America: Litigating the Holocaust in United States Courts*, 34 U. Rich. L. Rev. 1, 19 (2000) ("A total of ten cases involving Holocaust-era claims were filed in the United States between the end of World War II and October 1996, the start of the new era of Holocaust-claim litigation.").[7] The cases break down into several categories: finding of justiciability, finding of no justiciability, and skirting the political question doctrine or not reaching the doctrine.

The Eleventh Circuit's recent decision involving claims against banks falls into the first category. The court held that claims against two German banks that profited from the practice of Aryanization during World War II were not political questions. *See Ungaro-Banages v. Dresdner Bank AG*, 379 F.3d 1227, 1235-37 (11th Cir. 2004).

In contrast, the district court in this case relied heavily on litigation in federal district courts in New Jersey in which the courts determined that various Holocaust claims raised non-justiciable political questions.[8] *See Burger-*

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[7] In addition to Michael Bazyler's comprehensive review of Holocaust-era litigation, Burt Neuborne, counsel to various parties in Holocaust litigation, provides a helpful overview of the path of these cases. *See* Burt Neuborne, *Preliminary Reflections on Aspects of Holocaust-era Litigation in American Courts*, 80 Wash. U. L.Q. 795 (2002).

[8] The Holocaust Survivors argue that it was improper for the district court to rely on these out-of-circuit district court cases. Although these cases cannot be viewed as precedent, it certainly was not improper for the district court to reference them and

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Fischer v. Degussa AG, 65 F. Supp. 2d 248 (D.N.J. 1999); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424 (D.N.J. 1999).[9]

Other courts fielding Holocaust-era claims have skirted the political question doctrine. *See, e.g., Garb v. Republic of Poland*, 72 Fed. Appx. 850, 855 n.1 (2d Cir. 2003), *vacated and remanded by* 124 S. Ct. 2835 (2004) (cautioning in remanding claims brought by Jews against defendant states and their instrumentalities that the district court's "necessary factual inquiry should be conducted with appropriate attention to separation-of-powers concerns, inasmuch as the conduct of foreign relations is delegated to the political branches, and the adjudication of claims that risk significant interference with foreign relations policy may raise justiciability concerns") (citations omitted); *Goldstein v. United States*, No. 01-0005, 2003 U.S.

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[8] (...continued)
consider analogous principles. *See Hart v. Massanari*, 266 F.3d 1155, 1169 (9th Cir. 2001) (acknowledging practice of considering out-of-circuit cases when ruling on a novel issue of law). The Holocaust Survivors further challenge the use of these cases as improper in light of *Deutsch*. *See* 324 F.3d at 713 n.11. In *Deutsch*, we did not, however, reject the New Jersey cases wholesale but rather criticized the district court for invoking the political question doctrine when all that was required was "the simple application of the requirements of a treaty to which the United States is a party." *Id.*

[9] Following the district courts' dismissals of *Burger-Fischer* and *Iwanowa*, the plaintiffs pursued expedited appeals to the Third Circuit Court of Appeals. Neuborne, *supra* note 7, at 815. The appeals were adjourned in light of the impending establishment of a foundation to handle claims against German companies, and the appeals were "ultimately voluntarily dismissed in May 2001 in connection with the establishment of the German Foundation." *Id.*

Dist. LEXIS 19266 (D.D.C. Apr. 23, 2003) (memorandum opinion) (failing to reach political question doctrine because claims were barred by the doctrine of sovereign immunity in suit by Hungarian Jews against the United States for failure to take action to prevent the deaths of Jews during World War II and for recovery of stolen assets); *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 129 n.9 (E.D.N.Y. 2000) (explaining in case alleging French banks had failed to return assets seized during the Holocaust that the political question doctrine was "not even raised by the defendants here and [is] irrelevant to these facts in any event").

Still other courts have not reached the issue because the cases were settled prior to ruling on the defendants' motions to dismiss. *See In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164 (S.D.N.Y. 2000) (overseeing settlement proceedings in case against Austrian banks); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000) (overseeing settlement proceedings in Swiss Bank litigation).

With these varied views as a backdrop, we turn to consideration of the Holocaust Survivors' claims.

II. DISCUSSION

On appeal, the Holocaust Survivors address the first, second, and sixth *Baker* tests. The Vatican Bank maintains that the Holocaust Survivors' claims present political questions under all of the *Baker* tests. Because any single test can be dispositive, we address each in our discussion. Just as significantly, while we agree with the district court that certain types of claims arising out of World War II are properly left to the political branches, we take a surgical approach rather than a broad brush in benchmarking the *Baker* formulations against the individual claims. It is

incumbent upon us to examine each of the claims with particularity.

The dissent would have the political question doctrine remove from our courts "*all* matters that fall by their constitutional DNA into this sphere [of conduct involving foreign relations]." Dissent at 6705. This over-inclusive approach threatens to sweep all cases touching foreign relations beyond the purview of the courts—a practice warned against in *Baker*. *See* 369 U.S. at 210-11 ("Much confusion results from the capacity of the 'political question' label to obscure the need for case-by-case inquiry."). The Court's emphasis in *Baker* on "the necessity for discriminating inquiry into the precise facts and posture of the particular case," *id.* at 217, "is not merely hortatory," *McMellon v. United States*, 387 F.3d 329, 374 (4th Cir. 2004) (en banc) (Luttig, J., dissenting). We therefore decline from reflexively invoking the doctrine merely because the Holocaust Survivors' claims implicate foreign relations and instead proceed with a discriminating inquiry.

We conclude that the claims for conversion, unjust enrichment, restitution, and an accounting[10] with respect

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[10] The Holocaust Survivors are asking *the court* to order the Vatican Bank to provide the necessary information to conduct an accounting. This request contrasts with cases in which plaintiffs have asked courts to require *the political branches* to take action. *See, e.g., Earth Island Inst. v. Christopher*, 6 F.3d 648, 653-54 (9th Cir. 1993) (denying request that the court compel the Secretary of State to initiate negotiations with foreign nations); *see also Koohi v. United States*, 976 F.2d 1328, 1332 (9th Cir. 1992) ("Damage actions are particularly judicially manageable" whereas "the framing of injunctive relief may require the courts to engage in the type of operational decision-making . . . constitutionally committed to other branches."). It is an open question whether the Holocaust Survivors will be able to gain access to the

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to lost and looted property are not committed to the political branches (the "Property Claims"). Recovery for lost and looted property, however, stands in stark contrast to the broad allegations tied to the Vatican Bank's alleged assistance to the war objectives of the Ustasha, including the slave labor claims, which essentially call on us to make a retroactive political judgment as to the conduct of war (the "War Objectives Claims"). Such judgment calls are, by nature, political questions. With this bifurcation as a framework, we first address the Property Claims.

A. PROPERTY CLAIMS

None of the *Baker* formulations are inextricable from the Property Claims. Simply because a foreign bank is involved and the case arises out of a "politically charged" context does not transform the Property Claims into political questions. *See Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995) (holding that political question doctrine did not bar adjudication of claims brought under the ATS against a Bosnian-Serb leader for committing genocide and other atrocities).

As these excerpts from the Complaint demonstrate, the Property Claims consist of garden-variety legal and equitable claims for the recovery of property:

- "Looted Assets" is defined in the Complaint as including, *inter alia*, "cash, securities, silver, gold, jewelry, businesses, art masterpieces,

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[10] (...continued)
information needed for an accounting without diplomatic intervention considering that "[a] full accounting of the events of the Ustasha period . . . has to be found in the archives of other nations and possibly the Vatican." Ustasha Treasury Report, *supra* note 3, at 154.

equipment and intellectual property" that were improperly taken by any person or entity acting in furtherance of the Nazi or Ustasha regime.

- The second largest apparel factory in Yugoslavia was confiscated from the family of plaintiff Fred Zlatko Harris, including "50 advanced industrial Singer sewing machines." The family's investment real estate, car, and motorcycle were also confiscated by Ustasha forces.

- The "Ustasha and Germans" looted property "valued by the Tito government in 1948 in excess of $1,500,000 in prewar dollars" from the textile manufacturing assets of plaintiff Allen Dolfi Herskovich's family.

- Plaintiff Desa Tomasevic Wakeman describes how "money and other belongings including gold" were taken from her mother and grandmother by Ustasha forces.

- The looted assets were collected from a wide geographic area, with "[t]he Ustasha Treasury contain[ing] plunder from Ukraine and assets seized from the Ustasha victims in Yugoslavia."

- The Complaint lists whether the Vatican Bank "improperly retained or converted looted assets" belonging to the Holocaust Survivors as one of the common questions of fact for the proposed class.

- The Vatican Bank was unjustly enriched by "receiv[ing] stolen property given to [it] by members of the Ustasha Regime." The Holocaust Survivors further seek restitution for their "goods and property" that the Vatican Bank "wrongfully used and profited from."

- The Holocaust Survivors request that the court direct the Vatican Bank "to return all identifiable property looted from Plaintiffs and received by Defendants" and pay "the value [plus interest] of any identified property deposited by, or looted from, Plaintiffs and received by Defendants."

1. TEXTUALLY DEMONSTRABLE COMMITMENT

[3] Beginning logically with the first *Baker* test, we divine no explicit constitutional reference that is applicable to this case. *Cf. Gilligan v. Morgan*, 413 U.S. 1, 5-11 (1973) (noting the Constitution's explicit vesting of power in Congress to "organiz[e] . . . the Militia" in holding that a suit seeking to restrain the Governor's use of National Guard troops pre-sented political questions). More often, however, "there are few, if any, explicit and unequivocal instances in the Constitution of this sort of textual commitment. . . . The courts therefore are usually left to infer the presence of a political question from the text and structure of the Constitution." *Nixon*, 506 U.S. at 240-41 (White, J., concurring). In *Nixon*, the Court undertook an expansive review of the history of the Impeachment Trial Clause in concluding that the language and structure of the Constitution textually commits impeachment determinations to the Senate. *Id.* at 233-36; *see also Powell*, 395 U.S. at 520-48 (1969) (engaging in a similarly extensive review of the text and history behind the expulsion power in Article I, Section 5, to discern whether it grants Congress judicially unreviewable power to set qualifications of membership).

Here we are not faced with analyzing a specific clause of the Constitution but rather proceed from the understanding that the management of foreign affairs predomi-

nantly falls within the sphere of the political branches and the courts consistently defer to those branches. *See, e.g.*, *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 422 n.12 (2003) ("[I]n the field of foreign policy, the President has the 'lead role.'") (quoting *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767 (1972)); *Oetjen*, 246 U.S. at 302 (emphasizing that the conduct of foreign relations is committed to the political branches and is not subject to judicial inquiry); *Mingtai Fire & Marine Ins. Co. v. United Parcel Service*, 177 F.3d 1142, 1144 (9th Cir. 1999) (quoting *United States v. Pink*, 315 U.S. 203, 222-23 (1942)) ("[T]he conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government; [and] . . . the propriety of the exercise of that power is not open to judicial review."). Notwithstanding this general commitment of foreign relations to the political branches, in *Baker*, the Court cautioned that whether a court should defer to the political branches is a case-by-case inquiry because "it is error to suppose that every case or con-troversy which touches foreign relations lies beyond judicial cognizance." 369 U.S. at 211.

Our inquiry is further based on the premise that, unlike some World War II-era claims, the Holocaust Survivors' claims are not expressly barred by treaty.[11] U.S.

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[11] The dissent suggests that the Treaty of Peace with Italy, Feb. 10, 1947, art. 75, 61 Stat. 1245, 1400-01, controls this case. *See* Dissent at 6709-10. This emphasis is misplaced. The treaty was concluded with Italy, not the Vatican. *See* Vatican Background Note, *supra* note 2 ("Lateran Pacts confirming independence and sovereignty of The Holy See signed with Italy on February 11, 1929."). Further, as previously noted, because this case comes to us at the motion to dismiss stage, we must accept the Complaint's demarcation between the Vatican Bank, which is named as a defendant, and the Vatican, which is not named as a

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Const. art. II, § 2, cl. 1 (granting the President the power to make treaties); *see, e.g., In re World War II Era Japanese Forced Labor Litig.*, 114 F. Supp. 2d 939, 945 (N.D. Cal. 2000), *aff'd, Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003), (determining that the 1951 Peace Treaty with Japan essentially precludes all claims arising out of actions taken by Japan and its nationals during World War II).

Nor are the Holocaust Survivors' claims against the Vati-can Bank the subject of an executive agreement. *See Gara-mendi*, 539 U.S. at 415-16 ("Historically, wartime claims against even nominally private entities have become issues in international diplomacy, and three of the postwar settlements dealing with reparations implicating private parties were made by the Executive alone."); *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) ("Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement.").

In other circumstances, the Executive Branch has taken formal steps to intervene in certain claims arising out of the Holocaust. Most notably, the United States and Germany signed an executive agreement in July 2000 in which Germany agreed to enact legislation establishing a foundation (the "Foundation") to oversee the compensation of those "who suffered at the hands of German companies during the National Socialist era and World War II." Agreement Concerning the Foundation "Remembrance, Responsibility and the Future," July 17, 2000, U.S.-F.R.G.,

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[11] (...continued)
defendant. To the extent further discovery resolves the legal and political status of the Vatcan bank vis-à-vis the Vatican and/or Italy, the treaty could have some bearing. At this juncture, however, it is not applicable to the claims as plead.

39 I.L.M. 1298, 1298 ("Foundation Agreement");[12] *see also Garamendi*, 539 U.S. at 405-08 (describing the Foundation Agreement and similar agreements concluded with Austria and France).

The Holocaust Survivors' case is distinguishable from those involving the Foundation in that there is no analogous executive agreement covering claims to the Ustasha treasury. Despite the dearth of formalized accords, the Vatican Bank counters—and the district court agreed—that the absence of an agreement covering the Holocaust Survivors' claims is not dispositive of the issue. We agree. The question then comes back to whether the Property Claims are the type of claims committed to the political branches for resolution.

[4] We do not have much guidance in evaluating the nature of the non-treaty, non-executive agreement claims.

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[12] Courts have been inconsistent as to whether the Foundation Agreement precludes private litigation. *Compare Ungaro-Banages*, 379 F.3d at 1235 (explaining in holding that the political question doctrine did not act as a bar that "the plain text of the Foundation Agreement anticipates that federal courts will consider claims against German corporations") *with In re Nazi Era Cases Against German Defendants Litig.*, 334 F. Supp. 2d 690, 696-97 (D.N.J. 2004) (holding claim against German company arising out of so-called Nazi "medical experiments" was nonjusticiable on the basis of "[t]he history of foreign policy commitments devoted to the resolution of Holocaust-era claims, coupled with the relatively recent creation of the Foundation"); *see also* Neuborne, *supra* note 7, at 824 n.101 ("[The] precatory Statement of Interest [called for in the Foundation Agreement] has no preclusive effect. It leaves to the discretion of an Arti-cle III court whether additional Holocaust-era litigation should be entertained.").

At bottom, the Property Claims simply seek restitution for looted assets belonging to purported class members. Reparation for stealing, even during wartime, is not a claim that finds textual commitment in the Constitution.

The Holocaust Survivors do not, for example, seek back rent due a New York landlord from a country whose diplomats were expelled from the United States, *767 Third Ave. Assocs. v. Consulate Gen. of the Socialist Fed. Republic of Yugoslavia*, 218 F.3d 152 (2d Cir. 2000), or request an asset freeze based on a declaration that the Communist Vietnam government is an enemy of the United States, *Can v. United States*, 14 F.3d 160 (2d Cir. 1994), or challenge the executive power under the Hostage Act, *Smith v. Reagan*, 844 F.2d 195 (4th Cir. 1988), or raise a claim contingent on the safety and effectiveness of a military exercise, *Aktepe v. United States*, 105 F.3d 1400 (11th Cir. 1997), or present claims arising out of the CIA's involvement in the anti-Allende coup in Chile, *Schneider v. Kissinger*, 310 F. Supp. 2d 251 (D.D.C. 2004), or question the recognition of a foreign government, *Antolok*, 873 F.2d at 379-85.

Instead, the claims here bear more similarities to the property claims considered by the Supreme Court last year in *Altmann*. *See* 124 S. Ct. at 2243. Altmann brought suit against Austria and its national art gallery seeking to recover six Klimt paintings that were allegedly wrongfully obtained by the gallery after Nazi forces seized them during World War II. *Id.* The Court granted certiorari on the limited question of whether the FSIA applies retroactively, *id.*, and did not address the political question doctrine. Nonetheless, that the Court allowed the case to proceed underscores that courts have a place in deciding Holocaust-era claims concerning looted assets. *Cf. Rosner v. United States*, 231 F. Supp. 2d 1202, 1204 (S.D. Fla. 2002) (denying motion to dismiss, in part, in case alleging

that the United States seized valuables belonging to Hungarian Jews after World War II).

Significantly, the United States itself brought an action in federal district court in New York seeking civil forfeiture of a painting that the United States claimed was about to be exported in violation of the National Stolen Property Act. *See United States v. Portrait of Wally*, No. 99 Civ. 9940, 2002 U.S. Dist. LEXIS 6445 (S.D.N.Y. Apr. 12, 2002). "Wally," which was on loan from a museum in Austria, was taken from victims of the Holocaust during World War II. *Id.* at *6. The court rejected Austria's argument, as amicus curiae, that the court should not hear the case because of the political ques-tion doctrine. *Id.* at *38 (determining that none of the six *Baker* formulations was present). Although the claim was in rem in nature, rather than for damages, the consideration under *Baker*'s first test is the same.

[5] As with *Portrait of Wally* and *Altmann*, the Property Claims ultimately boil down to whether the Vatican Bank is wrongfully holding assets. Deciding this sort of controversy is exactly what courts do. The presence of a foreign defendant with some relationship to a foreign government and claims stemming from World War II atrocities tinge this case with political overtones, but the underlying property issues are not "political questions" that are constitutionally committed to the political branches.

The dissent's rhetoric aside, the question here is whether the suit should be stopped dead because of the political question doctrine. If Judge Trott contests the broad jurisdiction of U.S. courts to hear suits involving foreigners, or the scope of the FSIA—issues that are not even presented at this stage of the proceeding—then his

recourse is with Congress, not a quarrel with the majority. Our holding does not, as the dissent contends, "extend[ ] the concept of judicial authority into unknown territory and mistakenly exercise[ ] power and competence that plainly belongs to the President and to Congress." Dissent at 6715-16. Nor does it raise the spectre of a "World Court . . . with breathtaking and limitless jurisdiction to entertain the World's failures." Dissent at 6712. Rather, we hold true to a fundamental principle behind our separation of powers design, namely that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. (1 Cranch) at 177. Because the Property Claims do not raise questions "entrusted to one of the political branches or involv[ing] no judicially enforceable rights," *Vieth*, 124 S. Ct. at 1776, we fulfill our duty to say what the law is.

2. JUDICIALLY DISCOVERABLE AND MANAGEABLE STANDARDS

The Supreme Court discussed the second *Baker* test at length last term in *Vieth*. The plurality explained that political gerrymandering claims are nonjusticiable because no judicially discernible and manageable standards for adjudicating such claims exist: "One of the most obvious limitations imposed by that requirement is that judicial action must be governed by *standard*, by *rule*." 124 S. Ct. at 1777. In response to Justice Kennedy's concern that the plurality's decision was premature,[13] Justice Scalia replied,

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[13] Abiding by the rule that when "no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds," *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal

(continued...)

"But it is the function of the courts to provide relief, not hope." *Id.* at 1791. The crux of this inquiry is thus not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint. Rather, courts must ask whether they have the legal tools to reach a ruling that is "principled, rational, and based upon reasoned distinc-tions." *Id.* at 1777.

In conducting this inquiry, the refusal of five Justices in *Vieth* to hold that no manageable standard existed despite what the plurality termed "[e]ighteen years of essentially S. Ct. at 1793 (Kennedy, J., concurring) ("I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases."). pointless litigation," *id.* at 1792, counsels against holding a case nonjusticiable under the second *Baker* test without first undertaking an exhaustive search for applicable standards. *See id.* at 1795-96 (Kennedy, J., concurring) (calling for "err[ing] on the side of caution" in refraining from concluding that no manageable standards will emerge in the future). As Justice Ginsburg optimistically wrote, although "courts have been trying to devise practical criteria for political gerrymandering for nearly 20

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[13] (...continued)
quotation marks omitted), we treat the position enunciated in Justice Kennedy's concurrence as controlling. Although agreeing with the majority that the Court should refrain from intervention in the case at bar, Justice Kennedy declined to join the plurality in holding that all political gerrymandering claims are nonjusticiable. *Vieth*, 124 S. Ct. at 1793 (Kennedy, J., concurring) ("I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.").

years" without reaching a workable solution, "I do not accept it as sound counsel for despair." *Id.* at 1815-16 (Ginsburg, J., dissenting).

The district court determined that the second *Baker* test required dismissal, explaining that the Holocaust Survivors' case presents "intractable problems," including the task of identifying and notifying potential class members, the "multitude of sources" from which relevant materials would be gathered, and the likelihood that the parties would be able to gather all of the "pertinent data." It is not surprising that the district court zeroed in on "manageable standards" for deciding the case. The *Baker* language is not crystal clear in this regard and, understandably, other courts have similarly focused on case management. *See, e.g., Iwanowa*, 67 F. Supp. 2d at 488-89 ("[T]he relevant materials come from a multitude of sources, which . . . are voluminous and potentially unmanageable for individual courts to handle.")

Lest there be any doubt, *Vieth* refines and redirects the inquiry. In light of the Court's clarification in *Vieth*, we take a slightly different approach to interpreting the phrase "judicially discoverable and manageable standards." Instead of focusing on the logistical obstacles, we ask whether the courts are capable of granting relief in a reasoned fashion or, on the other hand, whether allowing the Property Claims to go forward would merely provide "hope" without a substantive legal basis for a ruling. *See Vieth*, 124 S. Ct. at 1791. We conclude that there are sound bases for providing relief.

The Holocaust Survivors' most straightforward claims involve identifiable personal property for which federal statutes, common law, state law, and well-established case law provide concrete legal bases for courts to reach a reasoned decision. *See, e.g.*, 28 U.S.C. § 1605(a)(3) (providing an expropriation exception to sovereign immunity in

certain cases involving "rights in property taken in violation of international law"); *Altmann*, 124 S. Ct. at 2245 (asserting jurisdiction under the FSIA's expropriation exception for return of artwork taken by Nazi forces); *Gruber v. Pac. States Sav. & Loan Co.*, 88 P.2d 137, 139 (Cal. 1939) ("It is settled that conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.").

[6] *Altmann* involved six paintings that were linked to a single plaintiff through an imperfect, but at least fairly well documented, chain of ownership. More difficult is tracking gold, silver, and other fungible assets, like money, especially those without bank account records or other reliable documentation. We are well aware that the Holocaust Survivors have a difficult task ahead of them in establishing the path that the looted funds followed. *See* Ustasha Treasury Report, *supra* note 3, at 154-55 ("The Croatian delegation [at the London Conference on Nazi Gold held in December 1997] stated that there were 22 lists specifying the gold [of the Ustasha], but the lists have not been found, and further documentation regarding the gold was assumed to be with the National Bank of Yugoslavia."); *id.* at 155 ("There is some evidence that at least part of the Croat Foreign Ministry archives was sent to the Vatican at the end of the War."). These looming evidentiary and proof obstacles do not change the fact that, at heart, the Holocaust Survivors seek compensation for stolen property, a claim that is very familiar in our courts. *Cf. Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991) (concluding that the second *Baker* test did not act as a bar in case against the Palestine Liberation Organization "because the common law of tort provides

clear and well-settled rules on which the district court can easily rely").

It would be premature for us to foreclose the Holocaust Survivors' claims because of such impending hurdles: The second *Baker* prong is not a proxy for the class certification analysis. *See* Fed. R. Civ. P. 23. As with every prospective class action, this one must pass through the Rule 23 filter, a process that could preclude the class or perhaps result in the reshaping of the class or in some other modification of the dispute. Concerns about class composition and size, as well as questions about access to relevant documents, should be left to Rule 23 proceedings and the discovery process.

Accordingly, the district court was misplaced in its reliance on the somewhat anachronistic *Kelberine v. Societe Internationale*, 363 F.2d 989 (D.C. Cir. 1966), to support the view that the Holocaust Survivors' claims present "intractable problems" that defy manageable judicial resolution. In *Kelberine*, the District of Columbia Circuit affirmed the dismissal of World War II-era claims against a Swiss holding corporation "for failure to state a claim upon which relief can be granted." 363 F.2d at 995. Without mentioning the political question doctrine, the court explained, "The procedure sought—adjudication of some two hundred thousand claims for multifarious damages inflicted twenty to thirty years ago in a European area by a government then in power—is too complicated, too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed." *Id.* Most significantly, *Kelberine* does not address the second *Baker* test. Nor can *Kelberine* serve as a guide to logistical infringement.

Since *Kelberine* was decided in 1966, the class action landscape has changed dramatically. Coincidentally, this same year marked the emergence of "modern class action

practice," *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 (1999), with the "innovative 1966 revision" to Rule 23, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997). *Kelberine* was also decided prior to creation of the Manual for Complex Litigation which, first published in 1969, is now in its fourth incarnation. *See* Fed. Judicial Ctr., Manual For Complex Litigation, Fourth (2004). This manual offers "an array of litigation management techniques and procedures," and recognizes that due to the presence of much "sparsely charted terrain[,] . . . judges are encouraged to be innovative and creative to meet the needs of their cases." *Id.* at 2-3.

While acknowledging the innovative and creative means that the judiciary has employed to tackle class actions, we are well aware that this is a behemoth of a case. Even so, courts have repeatedly risen to the challenge of handling cases involving international elements as well as massive, complex class actions. *See generally* Kenneth R. Feinberg, *Reporting From the Front Line—One Mediator's Experience With Mass Torts*, 31 Loy. L.A. L. Rev. 359, 371 (1998) (discussing "some of the practical problems which arise in attempting to resolve [mass tort] litigation and the pragmatic solutions offered to deal with these problems"). Courts also have fashioned innovative solutions to surmount similar obstacles in the Holocaust-claims context. *See, e.g., D'Amato v. Deutsche Bank*, 236 F.3d 78, 82 (2d Cir. 2001) (explaining in class action against German and Austrian banks that "the notice campaign also utilized newspaper advertisements, direct mailing to organizations throughout the world, and a world wide web home page"); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d at 147 (noting in context of reviewing settlement agreement that "some 550,000 Initial Questionnaires had been received from class members worldwide"). Our conclusion that this case is judicially "manageable"

does not diminish our understanding that burdening a district court with a case of this magnitude and complexity may prove to present a Sisy-phean task: Just when the court appears to be making progress towards reaching legal peace, the rock rolls back down and the court must tackle the next issue.

[7] The Holocaust Survivors unrealistically "anticipate that there will be no difficulty in the management of this litiga-tion." Of course there will be litigation management difficul-ties, but that does not mean that courts "lack . . . judicially discoverable and manageable standards" for resolving the Property Claims. *Baker*, 369 U.S. at 217. Concerns about class certification, discovery, and allocation, among other issues, are matters to be resolved at a later time. Today we conclude only that a legal framework exists by which courts can evaluate these claims in a reasoned manner.

3. INITIAL POLICY DETERMINATION

[8] Nor do we think that adjudicating the Property Claims will be impossible "without [making] an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. The Property Claims focus on the extent to which the Holocaust Survivors were wrongfully deprived of personal property and the value of such property that was transferred to the Vatican Bank. Adjudicating these discrete issues will not require the court to make pronouncements on foreign policy or otherwise trigger the third *Baker* test. *Cf. Aktepe*, 105 F.3d at 1404 (wrongful death claims arising out of a NATO training exercise raised nonjusticiable political questions in part because a decision would require "a policy determination regarding the necessity of simulating actual battle conditions").

4. LACK OF RESPECT FOR COORDINATE BRANCHES

The fourth *Baker* test requires us to consider whether it would be impossible for the courts to resolve the Property Claims without expressing a lack of respect for the political branches. *See Baker*, 369 U.S. at 217. As evidenced by the Vatican's protest to the State Department, this case implicates foreign relations. Whether the court's involvement would inevitably express a lack of respect for the Executive Branch's handling of U.S.-Vatican relations,[14] as well as relations with other foreign states, is a separate matter.[15] We conclude that judicial handling of the Property Claims will not run afoul of this fourth test.

More than four years have passed since the Vatican sent its protest to the State Department. The Holocaust Survivors represented to the court that the State Department has been apprised of this appeal but has said that its decision not to intervene is not reflective of its view on the merits of this case.

[9] Had the State Department expressed a view, that fact would certainly weigh in evaluating this fourth *Baker* formulation. In *Altmann*, the Court explained that "should

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[14] The United States and the Vatican established diplomatic relations on January 10, 1984. Vatican Background Note, *supra* note 2.

[15] In addition to relations with the Vatican, we recognize that, theoretically, this case could bear on the United States' relationship with Croatia, as well as other countries. But this theoretical possibility—even if common sense—does not dictate the confines of a political question.

the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." 124 S. Ct. at 2255 (footnote omitted); *see also* 28 U.S.C. § 517 ("The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States . . . ."). It is unclear, however, how courts should construe executive silence. We are not mind readers. And, thus, we cannot dis-cern whether the State Department's decision not to intervene is an implicit endorsement, an objection, or simple indifference. At best, this silence is a neutral factor.

A few weeks after *Altmann* was decided, the Supreme Court considered "a policy of case-specific deference to the political branches" as a possible limitation on the determination whether an international norm is sufficiently definite to support a cause of action. *Sosa*, 124 S. Ct. at 2766 n.21. The Court saw no need to apply this policy in *Sosa*. Nonetheless, the Court pointed to "several class actions" pending in federal district court seeking damages from corporations in connection with South Africa's former apartheid regime. *Id.* (citing *In re South African Apartheid Litig.*, 238 F. Supp. 2d 1379 (J.P.M.L. 2002) (granting a motion to transfer the cases to the Southern District of New York)). In the South Africa cases, the State Department filed a statement in support of South Africa's position that the cases interfered with the policy embodied by its Truth and Reconciliation Commission. 124 S. Ct. at 2766 n.21. The Court concluded, "In such cases, there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy." *Id.*

Such case-specific intervention is not uncommon in cases involving foreign affairs. *See Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1179-80 (C.D. Cal 2002) (listing numerous examples where the Executive Branch submitted its opinion in cases involving foreign affairs). In the Holocaust-era claims context, the United States agreed as part of the Foundation Agreement that whenever a German company was sued in a U.S. court over a Holocaust-era claim, the U.S. Government would submit a statement that foreign policy interests recommend recognition of the Foundation as the exclusive forum for such claims and "that U.S. policy interests favor dismissal on any valid legal ground." Foundation Agreement, 39 I.L.M. at 1304. The United States stopped short, however, of expressly precluding all claims. *See Garamendi*, 539 U.S. at 436 (Ginsburg, J., dissenting) ("The [Foundation] agreement makes clear, however, that 'the United States does not suggest that its policy interests concerning the Foundation in themselves provide an independent legal basis for dismissal.' ") (quoting Foundation Agreement, 39 I.L.M. at 1304). Courts have varied in their interpretation of the amount of deference these statements merit. *Compare Ungaro-Benages*, 379 F.3d at 1236 n.12 (statement of interest filed by U.S. Government under the Foundation Agreement is "entitled to deference, [but] does not make the litigation non-justiciable") *with Frumkin v. JA Jones, Inc. (In re Nazi Era Cases Against German Defendants Litig.)*, 129 F. Supp. 2d 370, 388-89 (D.N.J. 2001) ("If [the statement of interest filed by U.S. Government under the Foundation Agreement] does not clearly demonstrate that the claims against German Industry presently before the Court constitute political questions best left to the political branches, it is unclear to the Court what would."). Here, we are not even faced with evaluating the State Department's position because the Department has issued no statement in this case.

[10] Nor does allowing the Holocaust Survivors' claims to proceed mean that the political branches will be shut out from having any input as the case develops. As a State Department Deputy Legal Adviser explained: "Whether the U.S. Government agrees to facilitate the resolution of [future Holocaust-era disputes that are between private parties], will be, I think, a case-by-case decision, based on a judgement of the United States government interests involved in the circumstances presented." Ronald J. Bettauer, The Role of the United States Government In Recent Holocaust Claims Resolution, Keynote Address at the Stefan A. Riesenfeld Symposium 2001 (Mar. 8-9, 2001), *in* 20 Berkeley J. Int'l L. 1, 10 (2002). Such government involvement is not limited to a specified period during the judicial process, such as the motion to dismiss stage. *Cf. Kadic*, 70 F.3d at 250 (describing statement of interest filed by the government after oral argument on appeal). Accordingly, going forward, we respect the political branches' right to weigh in and to play a role in the resolution of the Holocaust Survivors' claims. *See generally* Neuborne, *supra* note 7, at 796 (analogizing process of resolving Holocaust-era claims to a "three-legged stool" made up of class action litigation, diplomacy, and community involvement). Given the Executive Branch's continuing silence on the Holocaust Survivors' claims, however, we follow *Sosa*'s lead that at this time "we need not apply here . . . a policy of case-specific deference to the political branches." 124 S. Ct. at 2766 n.21.

This case will proceed with foreign relations considerations as a backdrop, and the district court should and "can consider the nation's foreign policy interests and international comity concerns in [its] decisions." *Ungaro-Banages*, 379 F.3d at 1237; *see also Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 65 (D.D.C. 2004) (refusing to dismiss case but commenting that the court "will carefully construct the future course of this proceeding" bearing

"concerns founded in the principles of the political question, separation of powers, and act of state doctrines firmly in mind"). Despite these delicate considerations, the district court is fully capable of resolving the Property Claims without expressing a lack of respect for the political branches.

5. ADHERENCE TO A POLICY DECISION

[11] We see no concern that judicial handling of the Property Claims will involve "an unusual need for unquestioning adherence to a political decision already made." *Baker*, 369 U.S. at 217; *cf. Klinghoffer*, 937 F.2d at 50 (concluding that the fifth *Baker* test did not bar adjudication "because no prior political decisions are questioned—or even implicated—by the matter before us"). Indeed, this case is before us not because the Holocaust Survivors disagree with a political decision made regarding their claims, but rather because there simply has been no decision. *See Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1047 (9th Cir. 1983) (adjudicating case would not require the court to "challenge the wisdom or legality of any governmental act or decision"). Because of the lack of a policy decision on point, we do not reach the question posed by the fifth *Baker* test whether there is an "unusual need for unquestioning adherence" thereto. *Baker*, 369 U.S. at 217.

6. MULTIFARIOUS PRONOUNCEMENTS

[12] The only question remaining is whether adjudicating the Property Claims would "cause the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217; *see also Japan Whaling Ass'n.*, 478 U.S. at 230

(rejecting argument that the Court should defer adjudication on the basis of the sixth *Baker* test). On the contrary, this case is marked by the absence of "pronouncements" by the political branches regarding the resolution of claims to the Ustasha treasury.

We reject the Vatican Bank's argument that despite this vacuum, any adjudication of the Holocaust Survivors' claims would cause potential embarrassment because it would be inconsistent with the political branches' stated intent to resolve claims arising out of World War II by way of inter-governmental negotiations and diplomacy. *See Garamendi*, 539 U.S. at 421 (explaining that the "consistent Presidential foreign policy has been to encourage European governments and companies to volunteer settlement funds in preference to litigation or coercive sanctions").

[13] We are mindful of stepping on the toes of the political branches, but we disagree that *any* adjudication of the claims would implicate this final test. As discussed with regard to the War Objectives Claims, the district court should refrain from hearing those claims that require passing judgment on foreign policy decisions. On the other hand, fulfilling our constitutionally-mandated role to hear controversies properly before us does not threaten to cause embarrassment or multiple pronouncements. *Cf. Johnson v. Collins Entm't Co.*, 199 F.3d 710, 729 (4th Cir. 1999) (Luttig, J., concurring in the judgment) ("If the Congress sees fit to provide citizens with a particular cause of action, then we as federal courts should entertain that action—and unbegrudgingly.").

In the landscape before us, this lawsuit is the only game in town with respect to claimed looting and profiteering by the Vatican Bank. No ongoing government negotiations, agreements, or settlements are on the horizon. The

outside chance that the Executive Branch will issue a statement in the future that has the "potentiality of embarrassment" when viewed against our decision today does not justify foreclosing the Holocaust Survivors' claims, especially when "[t]he age and health of many of the class members also presses for a prompt resolution." *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d at 148.

[14] In sum, none of the *Baker* formulations is "inextricable" from the Property Claims. *See Baker*, 369 U.S. at 217. The Holocaust Survivors have presented a justiciable controversy.[16]

B. WAR OBJECTIVES CLAIMS

In contrast to the Property Claims, the Holocaust Survi-vors' allegations that "[t]he actions and conduct of Defen-dants, in addition to being profitable, actively assisted the war objectives of the Ustasha Regime" strike at the heart of the Ustasha's wartime conduct. The Holocaust Survivors catalog a litany of claimed international law violations:

- "Defendants knowingly facilitated and aided and abetted the activities of war criminals . . . .

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[16] Despite the dissent's protest that "[t]his is *not* our 'game,' period," Dissent at 6705, the Constitution does not relegate us to the sidelines. We are a player in adjudicating claims, and a crucial one at that. Abdicating that role and reflexively tossing the ball into the political branches' court without the requisite analysis of the individual claims would be tanta-mount to shirking our "obligation[ ] to decide cases and controversies properly presented to [us]." *W.S. Kirkpatrick & Co.*, 493 U.S. at 409.

Defendants created a 'ratline' or 'pipeline' to help the war criminals flee from prosecution."

- "Defendants . . . by assisting the Nazi backed Ustasha Regime in preserving their Treasury for the purpose of continuing a Government in Exile . . . and evading justice for genocidal war crimes[,] . . . committed war crimes, crimes against peace and crimes against humanity . . . ."
- "The [Vatican Bank] abused its position as the Papal bank of Vatican City by a clear pattern of violation of diplomatic norms . . . ."
- "Serbs, Jews, and the Roma were slaughtered in their villages after unspeakable tortures or burned alive in their churches. . . . Many were used as slave laborers. The remaining people were taken to concentration camps where the majority perished."
- "Jasenovac Concentration Camp complex . . . was the home of indescribable brutality . . . . Not only were inmates butchered but slave and forced labor was performed for the benefit of the Ustasha regime."

These claims, which we have denominated as the "War Objectives Claims," present a nonjusticiable political question.

[15] It is axiomatic that the Constitution vests the power to wage war in the President as Commander in Chief, U.S. Const. art. II, § 2, cl. 1, and the ability to "seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war" is "an important incident to [this

power]." *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942); *Doe v. Bush*, 323 F.3d 133, 137 (1st Cir. 2003) ("The Constitution reserves the war powers to the legislative and executive branches."). A plurality of the Supreme Court recently reaffirmed that the judicial branch "accord[s] the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize[s] that the scope of that discretion necessarily is wide." *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2649 (2004).[17] Wartime context aside, as discussed previously, "cases interpreting the broad textual grants of authority to the President and Congress in the areas of foreign affairs leave only a narrowly circumscribed role for the Judiciary." *Made in the USA Found.*, 242 F.3d at 1313.

Following World War II, the Executive Branch exercised its authority in a number of ways, including through the Nuremberg Trials, which included prosecution for "murder, extermination, enslavement, [and] deportation" among other crimes against humanity, war crimes, and crimes against peace. Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1546, 1547, 82 U.N.T.S. 279 ("Nuremberg Charter"). *See generally* Steven Fogelson, Note, *The Nuremberg Legacy: An Unfulfilled Promise*, 63 S. Cal. L. Rev. 833 (1990). Simply because the Nuremberg Charter does not expressly preclude national courts from trying war criminals, Nuremberg Charter, *supra*, 59 Stat.

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[17] We stress, however, that courts are not powerless to review the political branches' actions during wartime for, as the plurality cautioned in *Hamdi*, "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 124 S. Ct. at 2650.

at 1545, does not mean that it is our place to step in a half-century later and condemn the Vatican Bank and related parties for "participat[ing] in the activities of the Ustasha Regime in furtherance of the commission of war crimes, crimes against humanity, [and] crimes against peace." We are not a war crimes tribunal. To act as such would require us to "intrud[e] unduly on certain policy choices and value judgments that are constitutionally committed to [the political branches,]" *Koohi*, 976 F.2d at 1331, for we do not and cannot know why the Allies made the policy choice not to prosecute the Ustasha and the Vatican Bank. *See Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 386 (2000) (acknowledging that "the 'nuances' of 'the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of this Court' ") (quoting *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 196 (1983)).

Indeed, the Holocaust Survivors' allegations that the Vatican Bank violated international law by "creat[ing] a 'ratline' or 'pipeline' to help the war criminals flee from prosecution" could also be levied against the United States, which provided similar aid driven by the sudden shift in priorities from fighting the Nazis to driving back Communism:

> [The College of San Girolamo in Rome] helped fugitive Croatian war criminals escape to the Western Hemisphere in the early postwar years, and cooperated with the "rat line" being used by the U.S. Army Counter Intelligence Corps after the War to assist the escape from Europe of anti-Communists. The fact that the "rat line" later facilitated the escape even of a Nazi war criminal like Klaus Barbie underscores the shift in the Allies' attitudes: World War II was over; the Cold War was on.

Ustasha Treasury Report, *supra* note 3, at xviii. The United States has acknowledged that "conflicting priorities on the part of the Allies—particularly the need to rebuild a war-torn Europe and assemble a Western coalition against Soviet aggression with the onset of the Cold War—led to an insufficient recovery of looted gold and other assets." *Id.* at iv. It is not our role to sit in judgment as to whether the perceived Communist threat justified assisting alleged war criminals. Rather, we are mindful of the Supreme Court's admonition that it is up to the political branches to come to terms with these "delicate [and] complex" foreign policy decisions "for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

Whether the Holocaust Survivors' claims related to slave labor are justiciable is a more nettlesome question. The exact nature of the slave labor claims against the Vatican Bank is not entirely clear from the Complaint. The Holocaust Survivors allege that class members share a common question of fact whether "Defendants were directly and/or indirectly involved with the . . . conversion of . . . Plaintiffs' labor" and further allege that "Defendants have failed to . . . pay to Plaintiffs . . . the value of slave labor performed." Although the Complaint maintains that many of the Ustasha officials were Roman Catholic clergy, it does not indicate that the Vatican Bank itself directly exploited the slave labor. Unlike cases in which the defendants were the enslaving entities, the slave labor claims against the Vatican Bank are, in effect, derivative claims: The Ustasha profited from slave labor, these profits benefitted the Ustasha treasury, and portions of these tainted funds were transferred to the Vatican Bank. *Cf. Deutsch*, 324 F.3d at 704 (plaintiffs "were forced to

work as slaves" for defendant corporation); *Iwanowa*, 67 F. Supp. 2d at 431 (defendants forced plaintiffs "to perform forced labor under inhuman conditions").

[16] Determining whether the Vatican Bank was unjustly enriched by profits derived from slave labor would therefore necessitate that we look behind the Vatican Bank and indict the Ustasha regime for its wartime conduct.[18] We are not willing to take this leap. Condemning—for its wartime actions—a foreign government with which the United States was at war would require us to "review[ ] an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been 'constitutional[ly] commit[ted].' " *Goldwater*, 444 U.S. at 1006 (Brennan, J., dissenting) (quoting *Baker*, 369 U.S. at 217); *cf. Linder v. Portocarrero*, 963 F.2d 332, 337 (11th Cir. 1992) (holding in case involving the murder of an American by the Nicaraguan Contras that "the broad allegations . . . which comprise the entire military and political opposition in Nicaragua, are non-justiciable").

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[18] In rejecting the Holocaust Survivors' slave labor claims, we distinguish profits derived from slave labor from those derived from investing seized assets. In the former case, the court would need to evaluate the Ustasha's wartime use of slave labor, quantify the monetary value of this labor, and then determine the portion thereof that flowed to the Vatican Bank. In contrast, if the Holocaust Survivors can surmount the daunting evidentiary obstacles and establish that seized assets came to rest with the Vatican Bank, then the Property Claims could encompass both the value of the assets themselves as well as any profits earned by the Vatican Bank from the subsequent investment of the seized assets.

[17] This determination that the slave labor claims run afoul of the first *Baker* test is reinforced by the third *Baker* test, which asks whether the issue can be decided "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217. It is not our place to speak for the U.S. Government by declaring that a foreign government is at fault for using forced labor during World War II. Any such policy condemning the Ustasha regime must first emanate from the political branches.

Our conclusion that the slave labor claims are not justiciable comports with our decision in *Deutsch*. The two cases are superficially similar in that they address the same general subject matter of Holocaust-era slave labor claims. In *Deutsch*, however, we based our holding on federal-state relations rather than separation of powers concerns.[19] 324 F.3d at 70516. And, unlike this case where there are no treaties on point, we emphasized in *Deutsch* that "the United States resolved the war against Germany by becoming a party to a number of treaties and international agreements." *Id.* at 712 n.15. Consequently, although in both cases we reach the same ultimate conclusion that the slave labor claims cannot proceed, we do so here because adjudicating these claims would entail meddling in matters reserved to the political branches and not because this result is compelled by treaties.

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[19] The district court in *Deutsch* dismissed the action as presenting a non-justiciable political question. *See Deutsch*, 324 F.3d at 705 (citing *Deutsch v. Turner*, No. CV 00-4405 (C.D. Cal. Aug. 25, 2000)). On appeal, we disagreed with the court's application of the doctrine on the basis that the mere application of treaties concluded with Germany did not raise a political question. 324 F.3d at 713 n.11.

Nor does our decision conflict with the Second Circuit's reasoning in *Kadic*, a case which, in addition to geographic parallels, involved claims tied to similar genocidal acts. *See* 70 F.3d at 236-37. In *Kadic*, Croats and Muslims brought suit against Radovan Karadzic under the ATS alleging that he oversaw the genocidal campaign conducted by Bosnian-Serb military forces. *Id.* In holding that the claims were not barred by the political question doctrine, the court cautioned that "judges should not reflexively invoke the[ ] doctrine[ ] to avoid difficult and somewhat sensitive decisions in the context of human rights." *Id.* at 249. We agree. Unlike in *Kadic*, however, we think that "weigh[ing] carefully the relevant considerations" at stake in this particular case, adjudicating the slave labor claims in the context presented here would "compromis[e] the primacy of the political branches in foreign affairs." *Id.* Not only did the State Department "expressly disclaim[ ] any concern that the political question doctrine should be invoked" in *Kadic*, *id.* at 250, but the claims in *Kadic* focused on the acts of a single individual during a localized conflict rather than asking the court to undertake the complex calculus of assigning fault for actions taken by a foreign regime during the morass of a world war. The slave labor claims present no mere tort suit. On the contrary, these claims fundamentally rest on "controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n*, 478 U.S. at 230.

[18] Our decision to affirm the district court's dismissal of the War Objectives Claims is not a result we reach

lightly.[20] We do not wish to imply in the slightest that these claims do not represent gravely serious harms for which the Holocaust Survivors deserve relief. The difficulty is that relief lies elsewhere. As the court observed in *In re Austrian and German Bank Holocaust Litigation*, "Those persecuted by the Nazis were the victims of unspeakable acts of inhumanity. At the same time, however, it must be understood that the law is a tool of limited capacity. Not every wrong, even the worst, is cognizable as a legal claim." 80 F. Supp. 2d at 177. In this case, the Holocaust Survivors must look to the political branches for resolution of the War Objectives Claims which, at base, are political questions.

III. CONCLUSION

We REVERSE the district court's grant of the Vatican Bank's motion to dismiss with regard to the Holocaust Survivors' Property Claims for conversion, unjust enrichment, restitution, and an accounting. We AFFIRM the district court's grant of the Vatican Bank's motion to dismiss with regard to all other claims in the Complaint, specifically the War Objectives Claims. We also AFFIRM the district court's order dismissing the action against the Croatian Liberation Movement for lack of personal jurisdiction.

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[20] We caution that our holding does not signify that slave labor claims automatically raise issues that are committed to the political branches. As with all claims, this determination must be based on the circumstances of the particular case. *See, e.g., In re African-American*, 304 F. Supp. 2d at 1056-60 (concluding that slave reparation claims were not justiciable in part because "reparations to former slaves following the Civil War[ ] was considered and rejected by the Representative Branches").

AFFIRMED IN PART, REVERSED IN PART, and REMANDED. Costs shall be awarded to appellants.

TROTT, Circuit Judge, concurring in part, and dissenting in part:

It is unlikely that a better case could be made for the majority's view that some of these matters are justiciable than the one made by Judge McKeown in her well written opinion. Nevertheless, and with all due respect to my esteemed colleagues, I find part of their analysis unconvincing. In the main, the segregation for analytical purposes of the plaintiffs' claims into two distinct groups—"Property Claims" as distinguished from "War Objective Claims"—splits the atom where it is not divisible. In this respect, I agree with the defendants/appellees: "*All* claims asserted by plaintiffs are 'inextricably intertwined' with the Executive Branch's powers over war-related crimes, such that the judiciary is powerless to adjudicate them." Accordingly, although I agree that the so-called War Objective Claims are not justiciable, I respectfully dissent as to the others.

I concur in and adopt the district court's view that appellants' complaint unmistakably and inextricably raises issues that our Constitution commits to the legislative and executive branches of our government, not to the judiciary. *Alperin v. Vatican Bank*, 242 F. Supp. 2d 686 (N.D. Cal. 2003). This case fatally falls into at least two of the off-limits political question categories — defined as "formulations" — in *Baker v. Carr*, 369 U.S. 186, 217 (1962): (1) "a textually demonstrable constitutional commitment of the issue to a coordinate political department;" and (2) "a lack of judicially discover-able and manageable standards for resolving it." *Id.*

I

As to the primary formulation—a constitutional commitment of the issue to a political department—the record compels us to take our lead from Chief Justice Marshall who said that "[q]uestions, in their nature political, or which are, by the Constitution and laws, submitted to the executive, can *never* be made in this court." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803) (emphasis added). The *Baker* court repeated this "clearly settled" principle, which emanates from our Constitution's careful allocation and separation of powers between our three branches, and in so doing identified "foreign relations" as one of the areas in which nonjusticiable political questions routinely arise, citing *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918): "The conduct of the foreign relations of our Government is committed by the Con-stitution to the executive and legislative—'the political'—departments of the government, and the propriety of what may be done in the exercise of this political power is not sub-ject to judicial inquiry or decision." *Baker*, 369 U.S. at 211 n. 31. In elaboration of this doctrine, the *Oetjen* court said,

> The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be to the cases cited, in which claims for damages were based upon acts done in a foreign country, for it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly "im-

> peril the amicable relations between governments and vex the peace of nations."

246 U.S. at 303-04.

One of the earliest cases involving the respective authority of courts and Congress appears to be *United States v. Palmer*, 16 U.S. (3 Wheat.) 610 (1818), a case involving *inter alia* a robbery committed on the high seas by a non-citizen on board a ship belonging exclusively to subjects of a foreign state. The Court held (1) that a specific act of Congress criminalizing piracy did not give authority to our federal courts to take cognizance of, try, and punish such an act on the high seas as robbery, and (2) that the courts are not empowered to so act without authority from Congress. *Id.* at 633-35. In explanation of this decision, Chief Justice Marshall said,

> Those questions which respect the rights of a part of a foreign empire, which asserts, and is contending for its independence, and the conduct which must be observed by the courts of the union towards the sub-jects of such section of an empire who may be brought before the tribunals of this country, are equally delicate and difficult.
>
> As it is understood that the construction which has been given to the act of Congress, will render a particular answer to them unnecessary, the court will only observe, that such questions are generally rather political than legal in their character. *They belong more properly to those who can declare what the law shall be; who can place the nation in such a position with respect to foreign powers as to their own judgment shall appear wise; to whom are entrusted all its foreign relations; than to that tribunal*

> *whose power as well as duty is confined to the application of the rule which the legislature may prescribe for it.* In such contests a nation may engage itself with the one party or the other—may observe absolute neutrality—may recognize the new state absolutely—or may make a limited recognition of it. The proceeding in courts must depend so entirely on the course of the government, that it is difficult to give a precise answer to questions which do not refer to a particular nation. It may be said, generally, that if the government remains neutral, and recognizes the existence of a civil war, its courts cannot consider as criminal those acts of hostility which war authorizes, and which the new government may direct against its enemy. To decide otherwise, would be to determine that the war prosecuted by one of the parties was unlawful, and would be to arrange the nation to which the court belongs against that party. *This would transcend the limits prescribed to the judicial department.*

Id. at 634-35 (emphasis added).

The Court registered a similar observation in *Foster v. Neilson*:

> In a controversy between two nations concerning national boundary, it is scarcely possible that the courts of either should refuse to abide by the measures adopted by its own government. There being no common tribunal to decide between them, each determines for itself on its own rights, and if they cannot adjust their differences peaceably, the right remains with the strongest. *The*

> *judiciary is not that department of the government to which the assertion of its interests against foreign powers is confided; and its duty commonly is to decide upon individual rights, according to those principles which the political departments of the nation have established.*

27 U.S. (2 Pet.) 253, 307-08 (1829), *overruled on other grounds by United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833) (emphasis added).

The Supreme Court has spoken frequently about this issue, and each time it has reiterated the structural and prudential proposition that the "President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief and as the Nation's organ in foreign affairs." *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948). Accordingly, the Court has made it clear that

> the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Id. 333 U.S. at 111. *See also Schroeder v. Bush*, 263 F.3d 1169, 1175 (10th Cir. 2001).

Parenthetically, unlike the majority, I read this principle to include *all* matters that fall by their constitutional DNA into this sphere, whether the political branches have done anything about them or not. With all respect to

my valued colleagues, I see it as a mistake to measure this issue of justifiability by a "this lawsuit is the only game in town" standard. This is *not* our "game," period, and we do not become vested with jurisdiction by default of the other branches. The majority opinion indicates that Executive silence is somehow relevant. I humbly disagree. The silence of another Branch cannot give us jurisdiction we do not otherwise have. The non-existence of an executive agreement is meaningless.

Notwithstanding appellants' lawyers' ability to cast this dispute in "garden-variety" legal terms, i.e., conversion, unjust enrichment, restitution, etc., the ineffable fact remains that this functionally is a lawsuit against (1) the Vatican itself, (2) the Vatican Bank, which is an instrumentality of the sovereign state of the Vatican, and (3) untold others—including probably the Pope—seeking relief for World War II wrongs against foreigners committed by the Nazis and their allies in Europe almost sixty years ago. As Judge Debevoise said in *Burger-Fischer v. DeGussa AG*, 65 F. Supp. 2d 248, 281 (D.N.J. 1999), "It is not accurate to characterize the present actions as simply [typical] controversies between private parties." Much more is clearly at stake. Stripped to its essentials, this is a derivative lawsuit against a sovereign seeking "repa-rations" for injuries and losses suffered during wartime at the hands of the Nazis and their alleged accomplices. As acknowledged by the majority, the Vatican has filed a note of protest and asked our State Department to intervene. This set of facts and circumstances involving a foreign sovereign strikes me as demanding a "single-voiced statement" of our government's views, not a series of judgments by our courts. *Baker*, 369 U.S. at 211. I conclude, therefore, that the foreign policy quintessence of this case renders it as a subject matter beyond the power of the judiciary to intrude or to inquire.

Judge Greenaway's astute analysis in *Iwanowa v. Ford Motor Company*, 67 F. Supp. 2d 424, 485 (1999) is apposite:

> The executive branch has always addressed claims for reparations as claims between governments. Historically, at the end of a war, there has always been a declaration of victorious nations and defeated nations. As part of that process, the victorious nations invariably discuss the reparations that the defeated nations must pay to compensate the prevailing countries and their nationals for the loss that the aggressor country has caused. The nature of war is such that the governments of the victorious nations determine and negotiate the resolution of the claims of their nationals by way of agreements between the nations involved or affected by the war. This is evident from the reparations provisions in the Treaty of Versailles following World War I, and the discussion of reparations in the Yalta Conference, the Potsdam Conference and the Paris Reparations Treaty at the end of World War II. More recently, at the end of the Gulf War, the United Nations established an interna-tional claims resolution tribunal to resolve claims against Iraq. *See* Elyse J. Garmise, *The Iraqi Claims Process and the Ghost of Versailles*, 67 N.Y.U.L.Rev. 840, 841 (1992). Thus, it is evident that responsibility for resolving forced labor claims arising out of a war is constitutionally committed to the political branches of government, not the judiciary.

In a footnote to this discussion, the court observed that the " 'concept of reparations encompasses all international law claims for compensation related to war [including] individual claims by injured citizens of victorious powers.' " *Id.* at 485 n.84 (quoting Ministerial Director Horst Teltschik).

When California attempted by legislation to insert itself into Holocaust-era insurance policies, the Supreme Court stepped in and held that California's law was preempted because it interfered with the President's conduct of our Nation's foreign policy. In reversing our Ninth Circuit opinion to the contrary, *see Gerling Global Reinsurance Corp. of Am. v. Low*, 296 F.3d 832 (9th Cir. 2002), the Court made certain observations about the authority of the President that add considerable weight against the view that Alperin's claims are justiciable:

> Nor is there any question generally that there is executive authority to decide what that [foreign relations] policy should be. Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the "executive Power" vested in Article II of the Constitution has recognized the President's "vast share of responsibility for the conduct of our foreign relations."

Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003) (citation omitted). The *Garamendi* court continued:

> At a more specific level, our cases have recognized that the President has authority to make "executive agreements" with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic. See *Dames & Moore v.*

Regan, 453 U.S. 654, 679, 682-683, 101 S.Ct. 2972, 69 L.Ed.2d 918 (1981); *United States v. Pink*, 315 U.S. 203, 223, 230, 62 S.Ct. 552, 86 L.Ed. 796 (1942); *United States v. Belmont*, 301 U.S. 324, 330-331, 57 S.Ct. 758, 81 L.Ed. 1134 (1937); see also L. Henkin, Foreign Affairs and the United States Constitution 219, 496, n. 163 (2d ed.1996) ("Presidents from Washington to Clinton have made many thousands of agreements . . . on matters running the gamut of U.S. foreign relations"). *Making executive agreements to settle claims of American nationals against foreign governments is a particularly long-standing practice, the first example being as early as 1799, when the Adams administration settled demands against the Dutch Government by American citizens* who lost their cargo when Dutch privateers overtook the schooner *Wilmington Packet*. See *Dames & Moore*, *supra*, at 679-680, and n. 8, 101 S.Ct. 2972.

***

To begin with, resolving Holocaust-era insurance claims that may be held by residents of this country is a matter well within the Executive's responsibility for foreign affairs. Since claims remaining in the aftermath of hostilities may be "sources of friction" acting as an "impediment to resumption of friendly relations" between the countries involved, *Pink*, *supra*, at 225, 62 S.Ct. 552, there is a "longstanding practice" of the national Executive to settle them in discharging its responsibility to maintain the

> Nation's relationships with other countries, *Dames & Moore*, 453 U.S., at 679, 101 S.Ct. 2972. The issue of restitution for Nazi crimes has in fact been addressed in Executive Branch diplomacy and formalized in treaties and executive agreements over the last half century, and although resolution of private claims was postponed by the Cold War, *securing private interests is an express object of diplomacy today, just as it was addressed in agreements soon after the Second World War*. Vindicating victims injured by acts and omissions of enemy corporations in wartime is thus within the traditional subject matter of foreign policy in which national, not state, interests are overriding, and which the National Government has addressed.

Id. at 415, 420-21 (emphasis added).

Finally, as we recognized in *Deutsch v. Turner Corp.*, 324 F.3d 692, 712-13 (9th Cir. 2003),

> The United States has already exercised its own exclusive authority to resolve the war, including claims arising out of it. It did not choose, however, to incorporate into that resolution a private right of action against our wartime enemies or their nationals. The United States resolved the war against Germany by becoming a party to a number of treaties and international agreements, beginning with the 1945 agreements at Yalta and Potsdam, in which the United States, Britain, and the Soviet Union agreed to extract reparations from Germany and its nationals but did not include a private right

> of action against either. . . . Most recently, the Foundation Agreement of July 17, 2000, an executive agreement between the governments of Germany and the United States, provided a limited form of remedy for claimants such as Deutsch.

I would add that we entered into a similar treaty with Italy in 1947. Article 75 of that Treaty provides with respect to restitution as follows:

1. Italy accepts the principles of the United Nations Declaration of January 5, 1943, and shall return, in the shortest possible time, *property removed from the territory of any of the United Nations*.

2. *The obligation to make restitution applies to all identifiable property* at present in Italy which was removed by force or duress by any of the Axis Pow-ers from the territory of any of the United Nations, irrespective of any subsequent transactions by which the present holder of any such property has secured possession.

. . . .

8. The Italian Government shall restore to [the United Nation] all monetary gold looted or wrongfully removed to Italy.

Treaty of Peace with Italy, Feb. 10, 1947, U.S.-Italy, United States Statutes At Large, Vol. 61, pp. 1400-01.

II

As recognized by the majority, "t[illegible] potential class is mas-sive," and, as the district court concluded, the case as pleaded would be unmanageable. This unimpeachable observation brings this lawsuit within *Baker's* second

category: the task is beyond the competence of a court of law. The district court relied, in this respect, on *Kelberine v. Societe Internationale*, 363 F.2d 989 (D.C. Cir. 1966), which correctly said,

> The span between the doing of the damage and the application of the claimed assuagement is too vague. The time is too long. The identity of the alleged tort-feasors is too indefinite. The procedure sough—adjudication of some two hundred thousand claims for multifarious damages inflicted twenty to thirty years ago in a European area by a government then in power—is too complicated, too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed.

Id. at 995.

I agree with our prudent district court's carefully considered opinion, which echos the Supreme Court's concerns in *Waterman* about the aptitude and facilities in this context, that this case as presented would lack judicial reins:

> Here, by contrast, plaintiffs do not seek recovery of money and assets withheld from specific accounts but, rather, the undetermined value of property stolen in untold ways in a multiplicity of regions by both military personnel and civilians. Moreover, plaintiffs seek such recovery out of an undivided portion of the Ustasha Treasury transferred to the IOR. Such claims require a review of materials from a multitude of foreign sources that, "by sheer bulk alone," are likely to be unmanageable. *See Atlee*, 347 F. Supp. [689, 701 (E.D. Pa. 1972)]. Compounding the problem, "there is a distinct

> possibility that the parties might not be able to compile all of the relevant information, thus making any attempt to justify a ruling on the merits of an issue that will affect the nation difficult and imprudent." *See Iwanowa*, 67 F. Supp. 2d [424, 483-84 (D.N.J. 1999)]; *see also Atlee*, 347 F. Supp. at 702 (noting "the inherent inability of a court to predict the international consequences flowing from a decision on the merits.") Further, plaintiffs' claims require this Court to resolve the competing rights to the Ustasha Treasury of potentially hundreds of thousands of citizens of various nations, funds as to which any number of persons harmed by the Ustasha regime, both represented and not represented in these proceedings, might equally assert a claim.

Alperin, 242 F. Supp. 2d at 694-95. It will be interesting to say the least to watch the district court struggle on remand to enforce its rulings against the Vatican. Based on my experience with litigation involving foreign nations, it will be just a matter of time until the State and Justice Departments are dragged into this case as the district court begins to reach out for evidence and witnesses and to exercise its power to enforce its orders.

III

No one could possibly be comfortable identifying a barrier to the relief sought by these plaintiffs, persons who suffered some of the most unspeakably grievous injuries to their lives and families. As Judge Reinhardt said in *Deutsch*, the Holocaust was "the most atrocious act ever perpetrated by a civilized (or uncivilized) people, an act

unparalleled in history." 324 F.3d at 704. Nevertheless, our courts are not the appropriate fora for redress. What the majority has unintentionally accomplished in embracing this case is nothing less than the wholesale creation of a World Court, an international tribunal with breathtaking and limitless jurisdiction to entertain the World's failures, no matter where they happen, when they happen, to whom they happen, the identity of the wrongdoer, and the sovereignty of one of the parties. The consequences of this holding are overwhelming. I need go no deeper than the third amended class action complaint to illustrate this point:

> 1. This is a civil action arising under customary international law and the laws of the United States of America on behalf of named Plaintiffs and a class of all Serbs, Jews, and former Soviet Union citizens (and their heirs and beneficiaries), who suffered physical, monetary and/or property losses including slave labor, due to the systematic and brutal extermination of Jews, Serbs, and Romani by the Nazi puppet Regime, The Independent State of Croatia (NDH) led by Pavelic's Ustasha Regime, and as a result of the occupation of the former Soviet Union by Croatian military forces in concert with their German occupation forces. This is an action against the Vatican Bank, Franciscan Order and Unknown Catholic Religious Orders, Croatian Liberation Movement (HOP), Swiss National Bank (SNB) and as yet unnamed recipients of Nazi and Ustasha Loot, Swiss, Austrian, Argentine, Spanish, Italian, Portuguese, and German banking institutions and California and other United States correspondent banks for their participation in

and benefit from the Ustasha Regime's acts of cruelty and violence.

2. Plaintiffs and their heirs and beneficiaries seek accounting, restitution, disgorgement, and to recover damages arising out of the participation of Defendants, Vatican Bank or Istituto Per Le Opere Di Religione (hereinafter referred to as IOR), the Franciscan Order (OFM) and Unknown Catholic Religious Orders, Croatian Liberation Movement (HOP), Swiss National Bank (SNB), unknown recipients of Nazi and Ustasha loot, and other banking institutions and correspondent banks and religious orders and organizations in a common scheme and course of conduct: (a) to profit from, both directly and indirectly, the inhumane and genocidal system instituted by the Nazi-directed Ustasha Regime in Croatia and territories subject to Croatian civil or military occupation upon those peoples that it viewed, not as human beings, but as subhuman according to Nazi and Ustasha ideology; (b) to obtain, accept, conceal, convert and profit from assets looted by the Ustasha Regime and deposited in, or liquidated through, the IOR, SNB, unnamed Doe Defendant Banks, and Franciscan Order during the ascendancy of the Ustasha Regime and following the demise of the Regime at the behest of the former Ustasha and Nazi leaders through the offices of the Franciscan Order; and (c) to retain and convert assets deposited in their institutions by the Croatian Liberation Movement, Ustasha and/or the Franciscan Order and Unknown Catholic Religious Orders.

3. Defendants committed, conspired to commit, and aided and abetted others who committed crimes against peace, war crimes and crimes against humanity. Defendants assisted the Ustasha Regime and its leaders as well as prominent Nazis to successfully evade justice for their genocidal crimes by concealing and making available the considerable assets of the Ustasha Treasury.

***

WHEREFORE, Plaintiffs pray that the Court:

1. Certify this action as a class action pursuant to FEDERAL RULE OF CIVIL PROCEDURE 23, and designating named Plaintiffs as the class representatives and counsel for Plaintiffs as Class counsel.

2. Declare that Defendants by trafficking in, retaining, disposing of and concealing assets looted from targets of the Ustasha Regime with knowledge that the assets had been obtained through the systematic persecution, torture, slave labor, force, and murder, violated international treaties and customary international law enforceable in this Court as federal common law, the law of the nations and international law.

3. Order Defendants to make available all information relating to the Ustasha Treasury in order that an accounting of assets may be realized.

4. Direct Defendants to return all identifiable property looted from Plaintiffs and received by Defendants.

5. Award Plaintiffs the value of any identified property deposited by, or looted from, Plaintiffs and received by Defendants plus interest compounded annually since 1941.

6. Award Plaintiffs compensatory and punitive damages arising out of Defendants' unlawful behavior in trafficking in, retaining, disposing and concealing Looted Assets or profits of the Ustasha Regime with knowledge that the assets or profits were the fruits of Nazi-Ustasha violations of international law and were used to assist war criminals to evade justice.

7. Order Defendants to disgorge any profits earned by trafficking in, disposing of or concealing the Ustasha Treasury which was the fruits of violations of international law.

8. Grant Plaintiffs a jury trial on all issues so triable.

9. Award Plaintiffs the costs of this action, including reasonable attorneys' fees and expert fees; and,

10. Grant such other and further relief as shall seem just to the Court.

Our unauthorized transformation of our district courts into an open-door international tribunal far overreaches the authority of "the least dangerous branch" of our government. This opinion, albeit well-intentioned, extends the concept of judicial authority into unknown territory and mistakenly exercises power and competence that plainly belongs to the President and to Congress. Today, it is the Vatican and the Holocaust. Tomorrow, will it be horrors from Haiti, Cuba, Rwanda, South Africa, the Soviet Union, Bosnia, Sudan, Somalia, North Korea, Iraq, and who knows where The majority opinion sends our district judges on a crusade from which they are not equipped and which is doomed to flounder. As a class action, it will make all others seem like cakewalks. One can only wonder if the filing of this lawsuit is nothing more than a ploy to force the President and the State Department to take action. Similarly, one can only wonder why the beleaguered State Department would stand silently by

and allow this case to continue — in the Ninth Circuit no less, where mistakenly we would have allowed the *Garamendi* litigation to proceed.

Thus, I respectfully disagree that Alperin's unseverable "garden-variety" claims are justiciable.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EMIL ALPERIN, et al., Plaintiffs,	)	No. C99-4941 MMC.
v.	)	**ORDER GRANTING**
	)	**DEFENDANTS' MOTION**
VATICAN BANK, et al., Defendants.	)	**TO DISMISS**
	)	(Docket Nos. 85, 90, 199)

FILED Jan. 3, 2003

Before the Court are two separate motions to dismiss plaintiffs' Third Amended Complaint ("TAC"), filed, respectively, by defendant Order of Friars Minor ("OFM") and defendant Istituto per le Opere di Religione ("IOR"). The matters came on regularly for hearing on May 25, 2001. Ronald Mallen and Joanna Opperman of Hinshaw & Culbertson appeared on behalf of defendant OFM. Jeffrey Lena and John Niblock appeared on behalf of IOR. Tom Easton of the Law Offices of Thomas Dewey Easton and K. Lee Boyd of Pepperdine University Law School appeared on the behalf of plaintiffs. Having considered the papers filed in support of and in opposition to the motions and the arguments of counsel at the hearing, the Court rules as follows.

BACKGROUND

This case arises out of the atrocities committed during World War II at the behest of the Ustasha Regime ("Ustasha"), a Nazi puppet government that controlled the Independent State of Croatia ("Croatia") from 1941 through 1945 and occupied portions of the former Soviet Union along with German military forces. (*See* TAC ¶¶ 1,

43) The plaintiffs in this action are twenty-four individuals and four organizations. (*See* TAC ¶¶ 9-36.) The individual plaintiffs include victims of crimes against persons and property, and their descendants, currently residing in Europe and the United States.[1] The four organizational plaintiffs are (1) the Ukraine Organization of Ukrainian Antifascist Resistance Fighters, representing "8,500 former partisans and resistors of the Nazi occupation of Ukraine and concentration camp victims," (2) the Ukrainian Union of Nazi Victims and Prisoners, representing "over 300,000 former slave and forced laborers, prisoners, concentration camp, and ghetto survivors," (3) the Jasenovac Research Institute, a non-profit human rights organization and research institute "committed to establishing the truth about the Holocaust in Yugoslavia," and (4) the International Union of Former Juvenile Prisoners of Fascism, representing "Nazi victims in the former Soviet Union including Ukraine, Russia and Belarus." (TAC ¶¶ 33-36.)

Plaintiffs seek to represent "a class of all Serbs, Jews, former Soviet Union citizens (and their heirs and beneficiaries)," who suffered physical, monetary, and/or property losses or [were] forced into slave labor due to the systematic and brutal extermination of Jews, Serbs, and Romani by the Nazi puppet Ustasha Regime, and "as a result of the occupation of the Soviet Union by Croatian military forces in concert with their German occupation forces." (TAC ¶ 62.)

Defendant OFM is a religious brotherhood founded by St. Francis of Assisi. (OFM Mem. at 1 n. 1.) Defendant IOR is a "special institute established and located within the Vatican City State for managing economic assets

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[1] The Court will not endeavor to set forth herein a detailed description of the events giving rise to each of the plaintiffs' claims, which events include murder under the most horrific of circumstances, imprisonment, forced labor, and looting.

committed to it, and for administering those that serve to sustain works of religion and charity[2]." (Declaration of Father Daniel C. Conlin ("Conlin Decl.") ¶¶ 31-34.) The IOR was first constituted by Pope Leo XIII in the late 19th Century as the Commission for Charitable Causes ("Commission"), for the purpose of safeguarding and administering the capital of charitable institutions. (Piccolo Decl. Ex. E.) In 1941 and 1942, the "Commission" was transformed into what is currently known as the IOR, a "public juridical person[3]" created by chirographic[4] act of Pope Pius XII.[5] (Conlin Decl. ¶ 26; Piccolo Decl, Ex. C at 9, Exs. E, K.)

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[2] The IOR's By-Laws provide the following:

> The purpose of the Institute is to provide for the custody and administration of personal and real property transferred or entrusted to the Institute by natural or legal persons for religious works or charity.
>
> The Institute therefore accepts assets whose destination, at least partial or future, is indicated by the preceding paragraph. The Institute can accept deposits from entities or persons of the Holy See and of the State of Vatican City.

(Declaration of Josephine Piccolo (Piccolo Decl.) Ex. K at 4.)

[3] "Juridical persons," under Canon Law, are legal subjects capable of acquiring, retaining, administering, and alienating temporal goods according to the norms of ecclesiastical law. (Conlin Decl. ¶ 23.) "Public juridical persons" are those legal subjects which act pursuant to a mission received from hierarchical authority and who are closely governed by ecclesiastical authority. (Conlin Decl. ¶ 25.)

[4] A Chirograph, in the Law of the Vatican City State, is a legal instrument by which the Pope expresses his sovereign will. (Conlin Decl. ¶¶ 8-9, 14.).

[5] By a 1990 Chirograph, Pope John Paul II approved changes to the IOR's by-laws, retaining its name and purpose while "render[ing] the structures and the activities of the institute more adequate to the needs of the times." (Piccolo Decl. Ex. I.)

Plaintiffs allege that the IOR and OFM profited from the genocidal system instituted by the Ustasha by obtaining, accepting, concealing, and converting assets from the Ustasha treasury, which contained assets looted by the Ustasha during World War II. (TAC ¶ 2, 5.) Specifically, plaintiffs allege that, following the demise of the Ustasha Regime in 1945, members of the Roman Catholic clergy and the OFM assisted in the transfer of over 200 million Swiss francs from the Ustasha treasury to the IOR. (TAC ¶¶ 56, 60.) Plaintiffs further allege that the IOR thereafter helped transfer portions of the Ustasha treasury to Ustasha war criminals living abroad. (TAC ¶ 59.)

Plaintiffs also allege that the IOR and OFM "committed, conspired to commit, and aided and abetted others who committed crimes against humanity". (TAC ¶ 3.) Specifically, plaintiffs allege that during World War II, members of the Roman Catholic clergy and the OFM were "high officials" of the Ustasha government and that relations between the Vatican and Ustasha were "cordial." (TAC ¶¶ 54, 55.) Plaintiffs further allege that following the war, the IOR assisted Ustasha war criminals in evading justice through the transfer of funds and financial transactions involving banks in "various European and South American countries." (TAC ¶¶ 59, 60.) Plaintiffs allege that the OFM also assisted Ustasha war criminals evade justice, by providing them with money, hiding them on its properties, and operating a Nazi smuggling operation known as the "ratline." (TAC ¶¶ 38, 55.) Plaintiffs allege that both the IOR and OFM profited from these transactions. (TAC ¶ 60.)

On November 15, 1999, plaintiffs filed the complaint in this action. Following a series of motions to amend, stipulations of the parties, and orders of the Court, plaintiffs filed their Third Amended Complaint ("TAC") on August 30, 2000. Plaintiffs allege causes of action for conversion, unjust enrichment, human rights violations

and violations of international law. They seek an accounting, restitution, disgorgement of profits, and compensatory and punitive damages. (TAC ¶¶ 80-97.)

Both the IOR and OFM move to dismiss on the grounds that (1) the case presents nonjusticiable political questions, (2) plaintiffs lack standing, (3) the statute of limitations has expired and (4) the court lacks personal jurisdiction. Additionally, the IOR has moved to dismiss under the "comity of nations" doctrine and on the ground that the Foreign Sovereign Immunities Act (FSIA),28 U.S.C. § 1602, *et seq.*, bars plaintiffs' suit, and OFM has moved to dismiss on the ground that the Court lacks subject matter jurisdiction over plaintiffs' claims.

DISCUSSION

As noted, defendants' motions are based on a number of legal theories, each independently supporting dismissal of plaintiffs' claims. Upon agreement of the parties, the Court limits its discussion to the issue of whether plaintiffs' claims should be dismissed under the political question doctrine.

A. Overview of the Political Question Doctrine

"The political question doctrine holds that a federal court having jurisdiction over a dispute should decline to adjudicate it on the ground that the case raises questions which should be addressed by the political branches of government." *Iwanowa v. Ford Motor Co.*, 67 F.Supp.2d 424, 483-84 (D.N.J.1999) (citing *Baker v. Carr*, 369 U.S. 186, 210 (1962); *Atlee v. Laird*, 347 F.Supp. 689, 701 (E.D.Pa.1972), *aff'd sub. nom. Atlee v. Richardson*, 411 U.S. 911 (1973)). "The nonjusticiability of a political question is primarily a function of the separation of pow-

ers." *Baker v. Carr*, 369 U.S. at 210; *see Atlee v. Laird*, 347 F.Supp. at 692-700 (tracing evolution of political question doctrine). In essence, the doctrine limits the exercise of federal jurisdiction and forecloses judicial inquiry into matters whose resolution is committed to a coordinate branch of government. *See Baker*, 369 U.S. at 211.

The Supreme Court has identified the features that characterize a case raising a nonjusticiable political question:

> [1] A textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] or a lack of judicially discoverable and manageable standards for resolving it; [3] or the impossibility of deciding without an initial policy determination of a kind clearly for non-judicial discretion; [4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] or an unusual need for unquestioning adherence to a political decision already made; [6] or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. If any one of these factors is "inextricable from the case," the court should dismiss the case as nonjusticiable on the ground that it involves a political question. *See Baker*, 369 U.S. at 217.

It is well-established that "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and the legislative—'the political'—departments of the government; and the propriety of what may be done in the exercise of this political power is not subject to any judicial inquiry or decision." *See Oetjen v. Central Leather Co.*, 246 U.S. 297, 302. "The

political question doctrine distinguishes between cases encompassing foreign relations and those addressing purely domestic issues." *Iwanowa*, 67 F.Supp.2d at 484; (citing *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320,(1936); *Oetjen*, 246 U.S. at 302, *see Atlee*, 347 F.Supp. at 696, 701-03 (recognizing "critical distinction between political questions as they relate to purely domestic affairs and those relating to foreign affairs"). "Very different considerations" are involv d in cases encompassing foreign relations. *Atlee*, 347 F.Supp. at 701. As one court has noted:

> First, the potentially relevant information in a foreign policy case comes from a multitude of sources—both domestic and foreign—and might, by sheer bulk alone, be unmanageable for a court. In addition, there is the very real possibility that the parties might not assemble all the data, in which case any attempt by the court to justify a decision on the merits of an issue having so profound an affect on the nation would be both difficult and unwise . . . . A second major element concerns the inherent inability of a court to predict the international consequences flowing from a decision on the merits.

Id. at 702. Thus, when the foreign relations of the United States are at stake, courts properly are more hesitant to intervene than when the internal operations of this country are involved. *See id.* at 701 (recognizing "the need for federal courts to move with extreme caution in the sensitive area of foreign policy").

Nevertheless, "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker*, 369 U.S. at 211. Rather, courts should undertake a "discriminating analysis of the particu-

lar question posed, in terms of the history of its management by the political branches, its susceptibility to judicial handling in the light of its nature and posture in the specific case, and the possible consequences of judicial action." *Id.* at 211-12.

B. Application of the Political Question Doctrine

Here, consideration of the factors identified in *Baker* suggests that plaintiffs' case must be dismissed.

1. Commitment of the Issue to a Coordinate Political Department

First, the history of the management by the political branches of claims arising out of World War II and the Holocaust reveals a long-standing foreign policy commitment to resolving such claims at the governmental level. *See, e.g., In re Nazi Era Cases Against German Defendants Litigation,* 129 F.Supp.2d 370, 382 (D.N.J.2001) (holding "long-standing foreign policy commitment to resolving claims arising out of World War II and the Holocaust at a governmental level" provides basis for dismissal under the political question doctrine). Consequently, courts generally have recognized that adjudication through private litigation of claims such as those presented here would both intrude upon matters committed to the political branches and reflect a lack of respect for the coordinate branches of government. *See Burger-Fischer v. DeGussa AG,* 65 F.Supp.2d 248, 282, 284-85 (D.N.J.1999) (holding class actions against German corporations nonjusticiable under political question doctrine where plaintiffs alleged defendants participated in Nazi regime's looting of gold and personal property and in using and profiting from forced labor); *Iwanowa,* 67 F.Supp.2d at 485-86 (holding class action against German manufacturer and its American

parent nonjusticiable under political question doctrine where plaintiffs sought compensation and damages for forced labor in manufacturer's factory during World War II).

Starting with the Potsdam Conference in 1945, the United States has been a party to numerous treaties and agreements addressing reparations to be paid as a result of actions taken during World War II.[6] *See Burger-Fischer v. DeGussa AG*, 65 F.Supp.2d 248, 266-272 (D.N.J.1999). These efforts by the executive branch have continued up to recent times. *See id.* (citing to 1995 "Princz Agreement" and "1996 Second Supplemental Social Security Agreement"). Such action at the governmental level reflects a firmly-established policy that claims arising out of World War II "be resolved through government-to-government negotiations." *See Iwanowa*, 67 F.Supp.2d at 486.[7] Indeed, in 1953,

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[6] Treaties and agreements between the United States and former Axis powers immediately following the end of World War II include the Potsdam Agreement (1945), Paris Agreement (1946), Treaty of Peace with Italy (1947), Transition Agreement (1952-54), London Debt Agreement (1955). *See Burger-Fischer*, 65 F.Supp.2d at 265-269; *see also* Declaration of Joanna D. Opperman Ex.B.

[7] Plaintiffs attempt to distinguish the instant case from *Iwanowa* and *Burger-Fischer* on the ground that it is a "bank restitution case, not a reparations case." (*See* Pl's Opp. to OFM's Motion to Dismiss at 6.) This is a distinction without a difference. "Beginning with the Versailles Treaty concluding World War I, the term 'reparations' has been deemed to refer to 'all loss and damage to which . . . Governments and their nationals have been subjected as a consequence of the war imposed on them.' " *Burger-Fischer*, 65 F.Supp.2d at 275 (citing Treaty of Peace Between the Allied and Associated Powers and Germany, June 28, 1919, Art. 231, I Bevans 43, 137038). Moreover, to the extent such a distinction may be recognized, it is of no assistance to

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that policy was expressly declared by the State Department: "[R]eparations and other governmental claims relating to World War I and II should more appropriately be dealt with in the context of a peace treaty or similar arrangement." *See* Memorandum 5882, John Foster Dulles, Secretary of State, to the President, April 4, 1953, enclosure 7(a) at 4; Memorandums for the President—April 1953; Entry 1260; General Records of the Executive Secretariat, 1948-1956 (Lot File 56D459); General Records of the Department of State, Record Group 59; National Archives at College Park, College Park, MD.

While acknowledging the extensive involvement of the executive branch in the resolution of claims arising from World War II, plaintiffs argue that various treaties and reparation agreements have no bearing on the issue presented here because the IOR is located in the Holy See, which was not a party to any treaty or reparations agreement. (*See* Pl.'s Opp. to IOR's Mot. to Dismiss at 23; Pl's Opp. to OFM's Mot. to Dismiss at 8.) The existence of a treaty with these specific defendants, however, is not dispositive. The question, rather, is whether plaintiffs' claims are the type of claims that have been committed to the political branches for resolution. *See In re Nazi Era Cases Against German Defendants Litigation*, 129 F.Supp.2d at 378 ("The question is not whether Plaintiff's claims are barred by treaty, but whether his claims are such that they have been committed to the political

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[7] (...continued)
plaintiffs here. As the IOR points out, plaintiffs' claims are more properly characterized as claims for reparations. (*See* IOR Reply at 9 n. 19.) Plaintiffs do not identify as having been converted by the IOR or OFM any personal property, such as a bank deposit or insurance policy, and the relief sought is almost identical to that sought by the plaintiffs in *Burger-Fischer*. *See Burger-Fischer*, 65 F.Supp.2d at 253-54.

branches for resolution. To find that they have not been would be to conclude that his claims are somehow distinct from every other type of claim arising out of World War II and that they have somehow been left open for judicial resolution.")

Here, in addition to the treaties and agreements referenced above, the executive branch has manifested its continuing commitment to resolving individual claims arising out of World War II by actively encouraging other nations, including the Vatican State, to open their archives for the purpose of addressing the recovery and restoration of stolen gold and other assets and, in particular, any such gold and assets contained in the Ustasha Treasury. (*See* Declaration of Jeffrey S. Lena Ex. C ["U.S. and Allied Wartime Postwar Relations and Negotiations with Argentina, Portugal, Spain, Sweden, and Turkey on Looted Gold and German External Assets and U.S. Concerns About the Fate of the Wartime Ustasha Treasury," June 1998 ("Eizenstat Report")]). One such effort, the 1997 London Conference on Nazi Gold, is described in detail by the State Department in the Eizenstat Report. As noted therein:

> In December [1997] the British government brought together 41 countries and the Vatican at the London Conference on Nazi Gold. The London Conference was a landmark in the international community's effort to illuminate long-obscured facts from that dark chapter in history. Significant progress was made in coordinating research, addressing methodological issues and encouraging governments to open their archives and to make their records fully accessible. The London Conference highlighted as never before the international dimensions of the issue of looted gold, and catalyzed the work of the national commissions and others working to

> complete the historical record on this complex subject.

(*Id.* at xix.) In December of the following year, "[i]n order to sustain [the] positive momentum of the London Conference," (*see id.* at xx), the State Department co-hosted in Washington, D.C., the Washington Conference on Holocaust-Era Assets. The State Department's commitment to resolving this "complex subject" (*see id.* at xix) reflects a preference for a cooperative approach at the governmental level and further suggests that courts should not intervene.[8]

Ultimately, a court must consider the totality of the circumstances in determining whether a claim is one committed to the political branches for resolution. For all of the reasons discussed above, the Court finds plaintiffs' claims are such that they have been committed to the political branches and, as such, are not justiciable.

2. *Lack of Judicially Discoverable and Manageable Standards for Resolving the Issues*

The second of the *Baker* factors likewise requires dismissal, on the ground that there exist no "judicially discoverable and manageable standards" for resolving plaintiffs' claims.[9] *See Baker*, 369 U.S. at 217. Courts have

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[8] Plaintiffs question the efficacy of the above-referenced and other diplomatic negotiations with the Vatican. As was noted in *Iwanowa*, however, "[c]ourts may not pass judgment upon the political negotiations of the executive branch and the international community." *Iwanowa*, 67 F.Supp.2d at 487.

[9] Plaintiffs' reliance on *Koohi v. U.S.*, 976 F.2d 1328 (9th Cir.1992) to support an argument to the contrary is misplaced. In *Koohi*, a civilian Iranian airplane was mistakenly shot down by

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repeatedly recognized that they are ill-equipped to adjudicate class actions based on the kinds of claims presented here, and that such claims are the province of the political branches. In *Kelberine v. Societe Internationale, Etc.*, 363 F.2d 989 (D.C.Cir.1965), a class action against a Swiss holding company, based on a conspiracy by its German subsidiary and others to seize property and enforce slave labor during World War II, the Court of Appeals affirmed the district court's dismissal of the complaint on the ground that the plaintiffs' claims "pos[ed] an insoluble problem if undertaken by courts without legislative or executive guidance, authorization or support." *Id.* at 995. In so ruling, the court observed:

> The span between the doing of the damage and the application of the claimed assuagement is too vague. The time is too long. The identity of the alleged tortfeasors is too indefinite. The procedure sought—adjudication of some two hundred thousand claims for multifarious damages inflicted twenty to thirty years ago in a European area by a government then in power—is too complicated, too costly, to justify undertaking by a court without legislative provision of the means wherewith to proceed.

Id.

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[9] (...continued)
the U.S. Navy. The claims were for wrongful death, negligence and product liability. *Id.* In contrast to the instant case, all of the claims arose from a single event, the event occurred within a recent time frame, and the plaintiffs and their heirs were easily identifiable and limited in number. *See Koohi*, 976 F.2d at 1330.

Thirty-three years later, in *Iwanowa*, the court held the claims raised therein were non-justiciable on the same grounds. *See Iwanowa*, 67 F.Supp.2d at 489. Among the impediments to meaningful adjudication noted by the court were "the task of identifying and notifying thousands of potential plaintiffs around the world," the "multitude of sources" from which the relevant materials would come, and the likelihood that the parties would be unable to gather all of the "pertinent data." *See id.* at 489. All of these concerns are equally applicable to the instant action. As expressed by the court in *Iwanowa:* "The specter of adjudicating thousands of claims arising out of a war that took place more than fifty years ago amounts to a more daunting task for this Court to tackle than the *Kelberine* Court could have ever contemplated." *Id.*

Similarly, in *Burger-Fischer*, the district court noted the lack of judicial standards to adjudicate plaintiffs' claims:

> Wrongs were suffered not only by the classes of persons represented in these proceedings, however, but by many other classes of persons in many lands. They, too, had claims against German assets. By what conceivable standard could a single court arrive at a fair allocation of resources among all the deserving groups? By what practical means could a single court acquire the information needed to fashion such a standard?

Burger-Fischer, 65 F.Supp.2d at 284.

Plaintiffs point to two recent district court decisions in an effort to demonstrate that discoverable and manageable standards for resolving their claims exist: In *In re Holocaust Victim Assets Litigation*, 105 F.Supp.2d 139 (E.D.N.Y.2000), a class action against Swiss banks for concealing assets of Holocaust victims, accepting and laundering illegally obtained Nazi loot, and transacting in

the profits of slave labor, and *In re Austrian and German Bank Holocaust Litigation,* 80 F.Supp.2d 164 (S.D.N.Y.2000), a class action against Austrian and German banks for conversion of Holocaust victims' assets, profiting from forced and slave labor, and other violations of international law arising out of Nazi activities.

Plaintiffs' reliance on these cases is misplaced. In each instance, the district court exercised jurisdiction over the action for the sole purpose of approving a proposed class settlement. *See id.* at 167; *In re Holocaust Victim Assets Litigation,* 105 F.Supp.2d at 141-42. Moreover, in determining the propriety of those settlements, both courts recognized the significant practical and legal obstacles to litigation of the plaintiffs' claims. *See In re Holocaust Victim Assets Litigation,* 105 F.Supp.2d at 148 (citing *Iwanowa* and *Burger-Fischer* "as a reality check for those objectors who believe that strong moral claims are easily converted into successful legal causes of action"); *In re Austrian and German Bank Holocaust Litigation,* 80 F.Supp.2d at 177 ("The Court is impressed by the factual difficulties and legal defenses that plaintiffs face in further litigation of their claim. Each of the defenses outlined by the defendants appear to have merit.").[10] Neither court reached the issue of the justiciability of the plaintiffs' claims, nor were they faced with the task of actually adjudicating them.[11]

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[10] In both cases the defendants had moved to dismiss the plaintiffs' claims on numerous legal grounds, including the political question doctrine. Adjudication of those issues was precluded by the settlements.

[11] Plaintiffs argue that the Court should decline to dismiss their claims because other class actions have provided the "catalyst" for international agreements and "leverage" for resolution by settlement. (*See* Pl's Opp. to IOR's Mot. To Dismiss

(continued...)

Plaintiffs also cite *Bodner v. Banque Paribas*, 114 F.Supp.2d 117 (E.D.N.Y.2000), in support of their contention that plaintiffs' claims are justiciable. *Bodner* involved a class action by descendants of Jewish customers of French banking institutions, asserting a conspiracy on the part of the defendant banks to expropriate money and other property deposited therein during the Nazi occupation. *See Bodner*, 114 F.Supp.2d at 121-23. *Bodner* is distinguishable from the instant action on both its facts and the legal issues presented. The plaintiffs' claims in *Bodner* were based on the expropriation of distinct sums of money and deposited assets that remained in the hands of the defendant banks. *See id.* Moreover, the political question doctrine was never raised by defendants in their motion to dismiss, and thus was not before the court. *See Bodner*, 114 F.Supp.2d at 129 n. 9.[12]

Here, by contrast, plaintiffs do not seek recovery of money and assets withheld from specific accounts but, rather, the undetermined value of property stolen in untold ways in a multiplicity of regions by both military personnel

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[11] (...continued)
at 21.) Whether a settlement is reached in any individual case, however, has no bearing on the legal issues presented in the absence of such settlement. *See, e.g., id.* (considering apparent merit of available defenses in assessing fairness of class settlement).

[12] For similar reasons, the Court of Appeals' recent decision in *Altmann v. Republic of Austria*, 317 F.3d 954 (9th Cir.2002), is inapplicable. *Altmann* concerned a claim for recovery of six paintings seized by the Nazis from the plaintiff's uncle and ultimately housed in the Austrian Gallery. There, in contrast to the instant action, the plaintiff sought the return of specific, identifiable property, and the political question doctrine was not at issue.

and civilians.[13] Moreover, plaintiffs seek such recovery out of an undivided portion of the Ustasha Treasury transferred to the IOR. Such claims require a review of materials from a multitude of foreign sources that, "by sheer bulk alone," are likely to be unmanageable. *See Atlee*, 347 F.Supp. at 702. Compounding the problem, "there is a distinct possibility that the parties might not be able to compile all of the relevant information, thus making any attempt to justify a ruling on the merits of an issue that will affect the nation difficult and imprudent." *See Iwanowa*, 67 F.Supp.2d at 484; *see also Atlee*, 347 F.Supp. at 702 (noting "the inherent inability of a court to predict the international consequences flowing from a decision on the merits.") Further, plaintiffs' claims require this Court to resolve the competing rights to the Ustasha Treasury of potentially hundreds of thousands of citizens of various nations, funds as to which any number of persons harmed by the Ustasha regime, both represented and not represented in these proceedings, might equally assert a claim.

In sum, the instant action presents the same intractable problems as were recognized in *Kelberine*, *Iwanowa*, and

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[13] It also bears noting that the perpetrators of the crimes alleged are not uniformly identified. In some instances the Ustasha is expressly implicated (*See, e.g.*, TAC ¶ 24 (alleging plaintiff Mila Conger "was taken by Ustasha to Karlovac as a forced laborer.")) In others, the perpetrators are less clearly identified. (*See, e.g.*, TAC ¶ 1 (alleging plaintiff Emil Alperin resided in Odessa, Ukraine, where "Germans and allied Fascists, believed to be Croatians, looted and destroyed all [his] household belongings and personal property"; ¶ 21 (alleging plaintiff Milorad Skoric's family was taken away and their village of Loncarica, Yugoslavia, was burned down, "apparently by the Ustasha."))) In still other instances, the perpetrators are not identified at all, the allegations having been made in the passive voice. (*See, e.g.*, ¶ 27 (alleging plaintiff David Levy's "family property was taken and plaintiff was made a forced laborer."))

Burger-Fischer. In this instance, there exist essentially insurmountable barriers to identifying and dividing that portion of the Ustasha Treasury transferred to the OFM and IOR. In other words, plaintiff's claims present issues for which this Court lacks "judicially discoverable and manageable standards." *See Baker*, 369 U.S. at 217.

CONCLUSION

For the reasons expressed, the Court finds that plaintiffs claims present political questions that are not justiciable and, consequently, must be dismissed. This is not to suggest that plaintiffs are undeserving of relief. Indeed it is the very magnitude of the horrors giving rise to plaintiffs' claims and of the war in which they arose that places those claims beyond the purview of this Court. As one court has recognized:

> "It goes without saying that the events which form the backdrop of this case make up one of the darkest periods of man's modern history. . . . At the same time, however, it must be understood that the law is a tool of limited capacity. Not every wrong, even the worst, is cognizable as a legal claim."

In re Holocaust Victim Assets Litigation, 105 F.Supp.2d at 149.

Accordingly, the motions are hereby GRANTED and the above-entitled action is hereby DISMISSED as to the moving defendants.

This order closes Docket Nos. 85, 90, 166.

IT IS SO ORDERED.

Dated: January 3, 2003

/s/ MAXINE M. CHESNEY
United States District Judge

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EMIL ALPERIN, et al.,	)	
	)	No. 03-15208
Plaintiffs-Appellants	)	
	)	D.C. No.
v.	)	CV-99-04941-MMC
	)	
	)	Northern District
VATICAN BANK, aka Institute of Religious Works aka Instituto per le Opere Di Religione (IOR); et al,	)	of California,
	)	San Francisco
	)	
	)	
	)	
Defendants-Appellees.	)	

ORDER

Before: TROTT and McKEOWN, Circuit Judges, and SHADUR*, Senior Judge.

The attached majority opinion and dissent are substituted for the opinion and dissent filed on April 18, 2003.

With these substitutions, Jude McKeown has voted to deny the petitions for panel rehearing and rehearing en banc file by the Vatican Bank and the Order of Friars Minor. Judge Shadur has voted to deny the petitions for panel rehearing and has recommended granting the petitions for rehearing en banc.

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* The Honorable Milton I. Shadur, Senior United States District Judge for the Northern District of Illinois, sitting by designation.

The full court has been advised of the petitions for rehearing and rehearing en banc and no judge has requested a vote whether to rehear the matter en banc. Fed. R. App. P. 35. The petitions for panel rehearing and petitions for rehearing en banc are denied. No additional petitions for rehearing or rehearing en banc will be considered by the panel.

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Nos. 05-326 & 05-539

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In The
Supreme Court of the United States

ORDER OF FRIARS MINOR,

Petitioner,

v.

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Respondents.

ISTITUTO PER LE OPERE DI RELIGIONE,

Petitioner,

v.

EMIL ALPERIN, *et al.*,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether tort claims for confiscated property traceable to Petitioners Order of Friars Minor and Istituto per le Opere di Religione present nonjusticiable political questions under *Baker v. Carr*.

RULE 29.6 STATEMENT

Plaintiff Jasenovac Research Institute is a nonprofit corporation, has no corporate parent, and no publicly held company owns stock in it.

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RESPONDENTS' BRIEF IN OPPOSITION TO OFM AND IOR'S PETITIONS FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case involves claims by individuals against a commercial entity (the "Vatican Bank" or "IOR") and a private entity, the Order of Friars Minor ("OFM"), for property stolen by those entities during the Holocaust era and post-World War II.[1] The relief requested is compensation for unjust enrichment, an accounting, and restitution. For this relief to be granted, a court need not pass judgment, directly or indirectly, on any action by the United States government. Accordingly, the Ninth Circuit correctly declined to dismiss the property claims under the political question doctrine.

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[1] The property claim allegations must be taken as true for the purposes of a motion to dismiss on the basis of justiciability. The complaint alleges that "Defendants . . . have willfully and wrongfully misappropriated and converted the value of [property taken from the Holocaust Survivors] and its derivative profits into their own property." *Alperin v. Vatican Bank*, 410 F.3d 532, 543 (9th Cir. 2005). The allegations against Petitioner OFM state that "Franciscans, and other religious groups, have continued to use the funds derived from the Ustasha treasury." Further, "[t]he Ustasha Treasury provided substantial assets to IOR in form of gold, silver, cash, and gems. As the principle post war banker to the Ustasha Government in Exile, the IOR profited from Ustasha Treasury transactions involving banks in various European and South American countries. The Franciscan Order and unknown Catholic Religious Orders reaped similar monetary benefits from their involvement with the Ustasha Treasury" (Doc.#65, ¶ 60). The Holocaust Survivors' allegations are based not only on the secret documents declassified prior to, and after, the publication of the Eizenstat Report, but also on eyewitness testimony, that Franciscans were deeply involved in looting and money laundering (Doc.#65, ¶¶ 2,5,38,44-46,55-56,59-60).

Heeding this Court's caution that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance," the Ninth Circuit carefully scrutinized each of Plaintiffs' claims for non-justiciable political questions under *Baker v. Carr*. *Alperin*, 410 F.3d at 547 (citing *Baker v. Carr*, 369 U.S. 186, 210-11 (1962)).[2] Taking a "surgical" approach by applying the *Baker* standards separately to each of Plaintiffs' claims, the Ninth Circuit affirmed in part and reversed in part, upholding the dismissal of all claims alleging that "[t]he actions and conduct of Defendants, . . . actively assisted the war objectives of the Ustasha Regime." *Alperin*, 410 F.3d at 558-59.[3]

Thus, contrary to Petitioners' characterization of the claims to be adjudicated, there will be no judicial review of Defendants' assistance of war efforts or any judicial

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[2] In *Baker v. Carr*, this Court outlined six factors which, if "inextricably" involved, trigger the application of the political question doctrine: (1) a textually demonstrable constitutional commitment of the issue to a coordinate political department; (2) a lack of judicially discoverable and manageable standards for resolving the dispute; (3) the impossibility of deciding the case without an initial policy determination of a kind clearly for nonjudicial discretion; (4) the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; (5) an unusual need for unquestioning adherence to a political decision already made; or (6) the potentiality of embarrassment from multifarious pronouncements by various departments on one question. 396 U.S. at 217 (1962).

[3] The dismissed international law violations include claims for aiding and abetting the activities of war criminals, assisting the Nazi backed Ustasha Regime in preserving their Treasury, for the purpose of continuing a Government in Exile, and evading justice for genocidal war crimes, crimes against peace and crimes against humanity (including torture, rape, starvations, physical and mental abuse and summary execution), and slave labor. *Alperin*, 410 F.3d at 543-44, 548, 558-59, 562-63.

condemnation for the wartime actions of a foreign government. *Alperin*, 410 F.3d at 561 n.18. Therefore, the petitions before this Court address only the Ninth Circuit's holding that the claims for property losses are justiciable. *See Alperin*, 410 F.3d at 548-58 (remanding legal and equitable claims for property losses requiring adjudication of "seized assets [that] came to rest with the Vatican Bank . . . as well as any profits earned").

Applying the traditional *Baker* analysis to these property claims, the Ninth Circuit found that "[r]eparation for stealing, even during wartime, is not a claim that finds textual commitment in the Constitution." *Alperin*, 410 F.3d at 551. While the court acknowledged "that the management of foreign affairs predominantly falls within the sphere of the political branches," it found that since the property claims are not the subject of any executive initiative in the conduct of foreign affairs, judicial review would not offend the separation of powers. *Alperin*, 410 F.3d at 549. Plaintiffs' claims are neither barred by, nor referred to, in any treaty. *Alperin*, 410 F.3d at 549-50 (citing *Deutsch v. Turner Corp.*, 324 F.3d 692 (9th Cir. 2003)).[4] Nor are the property claims the subject of any executive agreement – including the agreements reviewed in the context of the preemption doctrine in *Am. Ins. Ass'n v. Garamendi*. *Alperin*, 410 F.3d at 550 (comparing property claims to Foundation Agreement in *Garamendi*); *see*

[4] Petitioner OFM's assertion that Plaintiffs' claims are barred by the Italian Peace Treaty of 1947 is an issue of fact not relevant to this pre-discovery stage of the proceedings. *See Alperin*, 410 F.3d at 550 n.11 (finding Treaty of Peace inapplicable to the property claims). Nor is the interpretation of treaty as a defense to Respondents' claims a nonjusticiable political question. Interpretation of treaties falls squarely within the purview of judicial review. *Baker*, 396 U.S. at 212.

also Garamendi, 539 U.S. 396, 405-08 (2003). Moreover, the property claims are not the subject of any executive branch statement of interest or the focus of ongoing government negotiations or settlements "on the horizon." *Alperin*, 410 F.3d at 558.

Therefore, following the *Baker* inquiry, the court held that the discrete issues presented by Plaintiffs' property claims would not require the court to make conflicting pronouncements on foreign policy initiatives. *Alperin*, 410 F.3d at 555. Because there has been no governmental initiative regarding the property claims, the court found no "unusual need for unquestioning adherence to a political decision already made." *Alperin*, 410 F.3d at 557 (citing *Baker*, 369 U.S. at 217). Given the "absence of 'pronouncements' by the political branches regarding the resolution of claims to the Ustasha Treasury," the adjudication of the property claims would not "cause the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Alperin*, 410 F.3d at 558 (citing *Baker*, 369 U.S. at 217). In conclusion, the court noted that "fulfilling our constitutionally-mandated role to hear controversies properly before us does not threaten to cause embarrassment or multiple pronouncements" to the executive branch. *Alperin*, 410 F.3d at 558.

In reviewing the district court's application of the second prong of the *Baker* standard requiring judicially discernible and manageable standards, the Ninth Circuit relied extensively on this Court's recent political question doctrine case *Vieth v. Jubelirer*, 541 U.S. 627 (2004). *See Alperin*, 410 F.3d at 552-55. The Ninth Circuit found that the "Holocaust Survivors' most straightforward claims involve identifiable personal property for which federal statutes, common law, state law, and well-established case law provide concrete

legal bases for courts to reach a reasoned decision." *Alperin*, 410 F.3d at 553. It concluded that, because the claims were governed by legal standard and rule, a court is well-suited to adjudicate the property claims.

The Ninth Circuit based its decision solely on the traditional, well-settled analysis set forth in *Baker v. Carr* and the political question doctrine cases following it. The court properly did not rely on decisions that do not address the political question doctrine or the separation of powers concerns underlying the doctrine. For example, it did not rely on the *Garamendi* decision, which is based on the unrelated constitutional doctrine of federal preemption. *Alperin*, 410 F.3d at 550-51 (distinguishing *Garamendi*). Nor did the court rely on the D.C. Circuit Court decision of *Kelberine v. Societe Internationale*, 363 F.2d 989 (D.C. Cir. 1966), which is based solely on the failure to state a prima facie claim and does not advert to the *Baker* analysis. *Alperin*, 410 F.3d at 554.

Nor did the court improperly focus on the separate identity of Defendants as suggested by Petitioner OFM, but rather focused on the nature of the claims, and whether adjudication presented a nonjusticiable political question. *Baker*, 396 U.S. at 217 (indicating the need for a "discriminating inquiry into the precise facts and posture of the particular case" when distinguishing between "political questions" and "political cases").

Accordingly, review is not warranted, and the petitions should be denied.

REASONS FOR DENYING THE PETITIONS

The Ninth Circuit's decision followed this Court's standards for applying the political question doctrine, and

created no split in circuit court authority. Accordingly, the extraordinary circumstances required for review of an interlocutory order are not present, and the petitions should be denied. *See Bhd. of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967).

The court's careful inquiry into whether Plaintiffs' claims would implicate any Executive initiative or political decision-making properly balanced the separation of powers concerns underlying the political question doctrine with the general admonition that federal courts should exercise jurisdiction over properly presented "cases and controversies." *See W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp.*, 493 U.S. 400, 409-10 (1990). This Court has cautioned that the political question doctrine is an exception to the exercise of jurisdiction and that the mere presence of foreign policy concerns does not immunize the case from judicial review. *Baker*, 369 U.S. at 211.[6]

The Ninth Circuit's application of *Baker* does not conflict with the decision in *Garamendi* which was decided on the sole basis of the federal preemption doctrine. *See* 539 U.S. 396 (holding that California insurance disclosure

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[6] Since *Baker*, this Court has rarely invoked the political question doctrine to bar justiciability. *See Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) (finding that the evaluation of the training of the Ohio National Guard was a political question due, in part, to the fact that judicial review would be essentially standardless and that the courts did not have the competence to make those determinations); *Goldwater v. Carter*, 444 U.S. 996 (1979) (finding that evaluating the President's power to terminate a treaty presented a political question); *Nixon v. United States*, 506 U.S. 224, 230 (1993) (finding insufficient precision in the language of Article I, section 3, clause 6 of the Constitution to afford any judicially manageable standard of review); and *Vieth v. Jubelirer*, 541 U.S. 267 (plurality finding that political gerrymandering claims presented a nonjusticiable political question).

statute was unconstitutional due to preemption by executive policy to resolve Holocaust-era insurance claims by international tribunal). Neither this Court, nor any lower federal court, has applied the analysis for whether a state statute is preempted to the justiciability inquiry under the political question doctrine. Likewise, the Ninth Circuit appropriately did not depart from the traditional *Baker* analysis for the political question doctrine.

Moreover, the Ninth Circuit concluded that under the *Baker* analysis, the resolution of Plaintiffs' property claims do not require the court to "second guess" any political decision by the executive branch. *See Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (holding that courts should not "review and perhaps nullify actions of the Executive"). Petitioners' suggestion that the executive agreements regarding Holocaust-era insurance claims addressed in *Garamendi* should govern here is misplaced because the agreements do not refer to any parties before the court or to the Plaintiffs' property claims. *See Garamendi*, 539 U.S. at 421-22; *Alperin*, 410 F.3d at 550-51; *see also* German Found. Agreement, 39 Int'l Legal Materials 1298.

Contrary to Petitioners' broad suggestion that the Ninth Circuit committed error in remanding the property claims, no court has ever held that the judiciary is precluded from resolving property claims that have never been addressed by the political branches through executive agreement, treaty, or formal statement of foreign policy interest. *Cf. Joo v. Japan*, 413 F.3d 45, 52 (D.C. Cir. 2005) (adjudication would "undo" executive policy contained in statement of interest and treaties with Japan); *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981) (adjudication barred by executive agreement transferring

claims to Iran claims tribunal); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 489 (D.N.J. 1999) (forced labor claims barred by post-war treaties with Germany); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 284 (D.N.J. 1999) (claims against German companies nonjusticiable under post-war treaties with Germany).

Indeed, the political branches have specifically endorsed international litigation against sovereigns under statutes such as the Foreign Sovereign Immunities Act that provides for jurisdiction over property-related cases arising out of wartime context. *See, e.g., Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 713 (9th Cir. 1992) (FSIA claims for conversion of property arising out of Argentina's "dirty war"). Property claims arising out of World War II against private entities have also been held to be justiciable. *See, e.g., Bodner v. Banque Paribas*, 114 F. Supp. 2d 117, 134 (E.D.N.Y. 2000) (holding no political question in action for damages, accounting, and recovery of looted property arising out of World War II).

Finally, because the Ninth Circuit followed *Vieth v. Jubelirer*, the lower court did not create a split in circuit court authority. Rather, the court properly distinguished the D.C. Circuit Court *Kelberine* case, as it was not decided on the political question doctrine, but rather on the grounds of failure to state a claim because the requested relief had been vested by federal statute to the Executive. 363 F.2d at 995. Unlike this case, the D.C. Circuit Court dismissed the complaint in *Kelberine* because it stated neither cognizable legal violations nor a known tortfeasor. 363 F.2d at 955. The *Kelberine* decision was not based on the political question doctrine and the D.C. Circuit Court of Appeals did not apply it in its recent decision based on the political question doctrine, despite the existence of

historically remote and complex facts. *See Schneider v. Kissinger*, 412 F.3d 190 (D.C. Cir. 2005).[6] Accordingly review is not needed to resolve a non-existent circuit split in the interpretation of the *Baker* standards.

Petitioners have stated no extraordinary reasons justifying review of the Ninth Circuit's decision on an interlocutory order. Review is premature and not warranted to correct a departure from Supreme Court authority under the political question doctrine or to address any split in the circuit courts. Accordingly, the petitions should be denied.

I. THIS COURT'S DECISION IN *GARAMENDI* WAS DECIDED AS A MATTER OF FEDERAL PREEMPTION AND HAS NO BEARING ON THE PRESENT PETITION, WHICH INVOLVES THE POLITICAL QUESTION DOCTRINE

First, Petitioners' assertion that the Ninth Circuit was bound by *Garamendi* is flawed. *Garamendi* was decided on

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[6] Nor is there a split in the circuits created by the district court cases cited by Petitioners that rely on *Kelberine*, that were never decided on appeal. Moreover, in each viable district court case, the Executive branch had taken clear action that would be implicated by adjudication. *See Burger-Fischer*, 65 F. Supp. 2d at 248 (finding political question where the court would have to pass judgment on previously made reparations agreements between United States and Germany); *Iwanowa*, 67 F. Supp. 2d at 486 (stating that judicial relief would show lack of respect for reparations negotiations conducted by Executive branch); *Anderman v. Fed. Republic of Austria*, 256 F. Supp. 2d 1098, 1115 (C.D. Cal. 2003) (holding existence of treaties and executive agreements addressing the claims created a nonjusticiable political question); *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d 721, 758 (N.D. Ill. 2005) (stating that Representative Branches' historical consideration and rejection of reparations to former slaves in lieu of other forms of relief precluded claims under political question doctrine); *Zivkovich v. Vatican Bank*, 242 F. Supp. 2d 659, 668 (N.D. Cal. 2002) (not viable because implicitly overruled by *Alperin*).

the basis of federal preemption, not the political question doctrine. Federal preemption, a factually and legally distinct doctrine, has no bearing upon the Ninth Circuit's analysis of the political question doctrine. Second, the executive agreements with Germany and the governmental initiatives in favor of resolving insurance claims at the international level which were found to be preemptive in *Garamendi*, neither extinguished nor addressed Plaintiffs' property claims against the Vatican Bank and the OFM. *See Garamendi*, 539 U.S. at 421-22; *Alperin*, 410 F.3d at 550-51; *see also* German Found. Agreement, 39 Int'l Legal Materials 1298. Accordingly, Petitioners' request for review should be denied.

A. The *Garamendi* Decision on Preemption Does Not Apply to the Ninth Circuit's Consideration of Justiciability

Petitioners' assertion that the Ninth Circuit's decision conflicts with *Garamendi* is an obvious misinterpretation of two entirely different constitutional doctrines: the political question doctrine and the preemption doctrine. Grounded in separation of powers, the political question doctrine ensures that the judicial branch will not address questions reserved to the political branches. *See Baker*, 369 U.S. at 210 ("The nonjusticiability of a political question is primarily a function of the separation of powers"). The doctrine is a limited exception to the presumption in favor of federal courts exercising Article III jurisdiction over "cases and controversies." *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). The *Baker* analysis is designed to preserve the balance between judicial duty to exercise conferred jurisdiction

against the due respect for constitutional prerogatives of the political branches. *Baker*, 369 U.S. at 210-11.

In contrast, the *Garamendi* decision was based on the doctrine of federal preemption resulting in finding unconstitutional a conflicting state insurance statute. *See* 539 U.S. at 401 (stating that the issue is "whether [California insurance law] interferes with the National Government's conduct of foreign relations"). In *Garamendi*, this Court reviewed the scope of federal policy embodied in several executive agreements and statements of interest that specifically addressed the federal preference that Holocaust insurance claims brought against German insurance companies be resolved by an international tribunal, the International Commission on Holocaust Era Insurance Claims. 539 U.S. at 401, 406-07, 416-17.

The preemption doctrine applied in *Garamendi* did not address the political question doctrine, which protects the decisions of the political branches from second-guessing by federal courts. *See Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986). Nor do Petitioners claim, and did not claim in the Ninth Circuit, that any state law is preempted by any federal action.

Petitioners have cited no judicial authority for the assertion that the Ninth Circuit was bound to apply the reasoning of the doctrine of federal preemption in *Garamendi* to the determination of justiciability under the political question doctrine. Since 1962, the federal courts have consistently followed *Baker*'s analysis of whether the claims before the court involve a textually-demonstrable commitment to the political branches. *See* 369 U.S. at 217 ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable

constitutional commitment of the issue to a coordinate political department").

Following the controlling *Baker* analysis, the Ninth Circuit acknowledged that the President had the "lead role" in the field of foreign affairs. *Alperin*, 410 F.3d at 549 (citing *Garamendi*, 539 U.S. at 422 n.12). The Ninth Circuit then determined under the political question doctrine authority that, in the absence of any executive policy regarding the Vatican Bank or the resolution of Plaintiffs' property claims, the claims were justiciable. *See Alperin*, 410 F.3d at 550 (comparing the existence of formal executive policy in *Garamendi* to the existence of no executive policy regarding claims in *Alperin*). Unlike this case, *Garamendi* addressed neither the political question doctrine nor the underlying separation of powers concerns. *See* 539 U.S. at 421-22 (deciding that scope of federal power established by several Executive agreements was in conflict with state statute). Accordingly, the reasoning in *Garamendi* is not applicable to this case. *See Baker*, 369 U.S. at 283-84 (Frankfurter, J., dissenting) ("The doctrine of political questions, like any other, is not to be applied beyond the limits of its own logic").

Review is not warranted on the basis of any conflict with the federal preemption decision in *Garamendi*, and the petitions should be denied.

B. The Executive Initiatives to Resolve Insurance Claims at Issue in *Garamendi* Do Not Apply to Plaintiffs' Property Claims

In *Garamendi*, this Court found that the executive branch's foreign policy, reflected in several executive agreements, preempted a state insurance statute. 539 U.S. at 421-22. Petitioners erroneously suggest that these

executive agreements and initiatives require a finding that Plaintiffs' property claims are committed by the Constitution to the executive branch. *See* IOR Brief at 19-23. The agreements in *Garamendi* were evaluated specifically for whether the federal government initiatives to resolve insurance claims at an international tribunal preempted plaintiff's insurance claims under a California statute requiring insurance companies to disclose information regarding Holocaust-era insurance policies. 539 U.S. at 406-07. In particular, this Court found that California legislative efforts to pressure insurance companies to disclose information about Holocaust-era insurance policies conflicted with the Executive's initiatives to resolve Holocaust insurance claims by the International Commission of Holocaust Era Insurance Claims (ICHEIC), as expressed by the executive branch through executive agreements. 539 U.S. at 420-26.[7]

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[7] Petitioners do not mention that the executive agreements at issue in *Garamendi* explicitly left open the availability of the United States' judicial system for resolution of future claims, guaranteeing only a statement of interest, not an independent basis for dismissal. *See* 539 U.S. at 440 (Ginsburg, J., dissenting) ("none of the executive agreements extinguish any underlying claim for relief"). Therefore, the Eleventh Circuit Court of Appeal in *Ungaro-Benages* held that accounting of assets and recovery of interest in company stolen by the Nazi regime were justiciable because, while the German Foundation Agreement which was examined in *Garamendi* demonstrated a U.S. preference for political resolution, it "neither settles the outstanding claim nor directs that all claims be transferred to the Foundation's settlement procedures." 379 F.3d 1227, 1234 (11th Cir. 2004). As a result, "the executive opted not to settle these claims or to transfer the claims to the Foundation, although it had the power to do so." *Ungaro-Benages*, 379 F.3d at 1235. Indeed, forty class action and individual actions against European insurance companies not covered by the executive agreements in *Garamendi* are still pending in the Eastern District of New York. *See, e.g., Lichtig v. Generali*, MDL 1374/M21-89/04CV5694 (MBM); *Littman v. Generali*, MDL 1374/M21-89/04CV5698;

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In contrast, there is no executive policy embodied in any agreements to resolve Plaintiffs' property claims against the OFM and the Vatican Bank. *See* Appellee IOR's Answer Brief, 2004 WL 1125507 at 25. It would have been improper for the Ninth Circuit to apply the reasoning in *Garamendi*, in the absence of any evidence that the agreements in *Garamendi* or any other governmental initiatives apply to the resolution of Plaintiffs' property claims. *See* 539 U.S. at 442-43 (Ginsburg, J., dissenting) ("[C]ourts step out of their proper role when they rely on no legislative or even executive text, but only on inference and implication"). Accordingly, review is not warranted on the basis of any conflict with *Garamendi*.

II. NO CONFLICT IN THE CIRCUIT COURTS WAS CREATED BY RELYING ON SUPREME COURT AUTHORITY TO DETERMINE THAT JUDICIAL STANDARDS EXIST TO DECIDE PROPERTY CLAIMS, RATHER THAN RELYING ON *KELBERINE*, WHICH DID NOT MENTION THE POLITICAL QUESTION DOCTRINE

In *Baker*, this Court stated that "[p]rominent on the surface of any case held to involve a political question is found . . . a lack of judicially discoverable and manageable

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Mermel v. Generali, MDL 1374/M21-89/04CV5699; *Monitz v. Generali*, MDL 1374/M21-89/04CV5696; *Nasch v. Generali*, MDL 1374/M21-89/04CV3394; *Rakover v. Generali*, MDL 1374/M21-89/04CV5697; *Schaechner v. Generali*, MDL 1374/M21-89/04CV3395; *Steinberg v. Generali*, MDL 1374/M21-89/04CV3392; *Wolf v. Generali*, MDL 1374/M21-89/04CV5695; *Brown v. Generali*, MDL 1374/M21-89/04CV3390; *Diller v. Generali*, MDL 1374/M21-89/04CV5692; *Gabor v. Generali*, MDL 1374/M21-89/04CV3391; *Greenman v. Generali*, MDL 1374/M21-89/04CV5700; *Greenstein v. Generali*, MDL 1374/M21-89/04CV3393; *Gruber v. Generali*, MDL 1374/M21-89/04CV5693.

standards for resolving it." 369 U.S. at 217. This Court has interpreted this test as an inquiry into whether there are judicial rules and standards applicable to the issues before the court. *See United States v. Munoz-Flores*, 495 U.S. 385, 395-96 (1990). This interpretation has been followed by the Ninth Circuit, as well as the other circuit courts. *See, e.g., Ungaro-Benages*, 379 F.3d at 1235; *Kadic v. Karadzic*, 70 F.3d 232, 249-50 (2d Cir. 1995); *Koohi v. United States*, 976 F.2d 1328, 1331 (9th Cir. 1992); *Republic of Phillippines v. Marcos*, 862 F.2d 1355, 1361 (9th Cir. 1988).

The only case cited by Petitioners in support of their argument that the Ninth Circuit decision created a conflict among circuits is *Kelberine*. However, that case did not address the political question doctrine or apply the standards set forth in *Baker*. Rather it decided a motion to dismiss for failure to state a prima facie claim on which relief could be granted. *See Kelberine*, 363 F.2d at 995. Moreover, the D.C. Circuit Court itself has not relied on *Kelberine* as authority for recent decisions based on the political question doctrine. *See Schneider*, 412 F.3d at 198.

Because the Ninth Circuit correctly applied the judicially-manageable-standards prong of the *Baker* test just as it has been applied by the other circuits, including the D.C. Circuit Court, review of this issue is not warranted.

A. The Ninth Circuit Followed Established Supreme Court Authority On the Political Question Doctrine's "Judicially-Manageable Standards" Inquiry

Since *Baker*, this Court has affirmed that even in politically-charged cases, where "the general nature of the inquiry . . . [is] . . . familiar to the courts" the case does not

present a nonjusticiable political question. *See Munoz-Flores*, 495 U.S. at 395-96. Only where the issues before the court require a political policy judgment for which no judicial standards or remedies exist, has this Court found a non-justiciable political question on *Baker*'s second prong. *See Gilligan*, 413 U.S. at 11-12 (holding that supervision of the training of National Guard was beyond judicial cognizance); *Ludecke v. Watkins*, 335 U.S. 160, 170 (1948) (holding that removal orders for German alien under delegated executive authority under Alien Enemy Act are "matters of political judgment for which judges have neither technical competence nor official responsibility"); *Nixon*, 506 U.S. at 228 (holding that fashioning standards and remedies for Senate impeachment proceedings or remedies lacked judicially manageable standards).[5]

In *Vieth*, this Court affirmed that it is the nature of the inquiry which defines the second prong of the *Baker* analysis – whether its resolution calls for a governmental policy determination or is susceptible to judicial remedy. *See* 541 U.S. at 278 (stating that so long as the "judicial action is governed by *standard*, by *rule*" the claims are justiciable) (emphasis in original).[6] Applying the standards

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[5] However, the Court in *Gilligan* noted that claims addressing the specific conduct of the National Guard would be justiciable because remedies for injuries arising out of such conduct did exist. 413 U.S. at 5.

[6] Justice Scalia's plurality opinion distinguished the judicially-manageable-standard of population equality regarding voting, where the courts may decide whether a violation has occurred based on three legal factors, from the petitioners' request that the Court decide how a political party's majority status is established, where the courts must navigate a "sea of imponderables." *Vieth*, 541 U.S. at 290. Despite this difficulty in assessing fairness in districting, Justice Kennedy was still cautious about foreclosing all future inquiry when an alleged constitutional right is burdened or denied. *Vieth*, 541 U.S. at 309-10 (Kennedy, J. concurring). Justice Kennedy's reluctance reinforces this Court's

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in *Vieth*, the Ninth Circuit correctly reasoned that "[t]he crux of this inquiry is thus not whether the case is unmanageable in the sense of being large, complicated, or otherwise difficult to tackle from a logistical standpoint. Rather, courts must ask whether they have the legal tools to reach a ruling that is 'principled, rational, and based upon reasoned distinctions.'" *Alperin*, 410 F.3d at 552 (quoting *Vieth*, 541 U.S. at 278).

The long-standing focus of this prong of the political question doctrine as an inquiry into the existence of legal rules and standards has been followed by the circuit courts. *See, e.g., Deutsch v. Turner Corp.*, 324 F.3d 692, 713 (9th Cir. 2003) (holding no political question regarding World War II slave labor claims against foreign corporations to the extent claim involved only proper application of a treaty); *Ungaro-Benages*, 379 F.3d at 1230, 1237; *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione, etc.*, 937 F.2d 44 (2d Cir. 1991).

Accordingly, review is not warranted to correct the Ninth Circuit's application of the "standards" prong of *Baker* or to address a conflict in the circuits.

B. *Kelberine* Was Not Based on the Political Question Doctrine and Has Not Been Followed by the D.C. Circuit Court

Petitioners fail to mention that the D.C. Circuit Court's consideration of logistical manageability of the Holocaust survivors' claims in *Kelberine* was not in the

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warning in *Baker*, recognizing the "necessity for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing." 369 U.S. at 217.

context of a political question doctrine analysis, but rather a decision based on a motion to dismiss for failure to state a claim under Fed. R. Civ. P. Rule 12(b)(6). *Kelberine*, 363 F.2d at 992, 995.

Specifically, *Kelberine* was an action to enjoin the Attorney General of the United States and the Secretary of the Treasury from paying to a Swiss corporation any part of $120 million claimed by a class of Holocaust survivors. 363 F.2d at 992. The Circuit Court held that Holocaust survivors' complaint had not stated a basis for which relief could be granted for two reasons: 1) all rights to the funds claimed had been specifically vested in the United States government by federal statute; and 2) the plaintiffs' claims to the funds as framed in the complaint "did not arise under the Constitution or laws of the United States, or within the territorial jurisdiction of the courts of the United States." *Kelberine*, 363 F.2d at 995. The court reasoned that since the United States had not consented to suit, there was no legal relief that could have been granted "by a court without legislative provision of the means wherewith to proceed." *Kelberine*, 363 F.2d at 995.[10]

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[10] The "antecedent history" of the *Kelberine* case was extremely complicated. *Kelberine*, 363 F.2d at 991. The $120 million fund claimed by the Holocaust survivors had been the subject of a previous civil suit brought by a European company, Interhandel, in 1948 against the United States under the Trading With the Enemy Act. *Kelberine*, 363 F.2d at 991. After extensive litigation, in 1963, the case was settled by an agreement written and filed in the suit stipulating that stock in possession of the United States as Alien Property Custodian would be sold at public auction and transferred to Interhandel by the Attorney General. *Kelberine*, 363 F.2d at 991. The Holocaust survivor plaintiffs in *Kelberine* claimed that the funds allotted to Interhandel by the previous lawsuit were illegally seized from the plaintiffs by a "number of men and corporations in Europe" acting as part of the "Nazi Conspiracy." 363 F.2d at 992. Because the Attorney General had statutory power to settle

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Also, the claims to the property were not framed under a "thesis" "presently susceptible of judicial implementation" and did not "arise under" any rule discoverable by the court. *Kelberine*, 363 F.2d at 995. Finally, the D.C. Circuit Court held that no cognizable claim had been stated where "[t]he events, the witnesses, the *guilty tortfeasors*, their membership in the conspiracy are all so potentially vague at this point as to pose an insoluble problem if undertaken by the courts without legislative or executive guidance, authorization or support." *Kelberine*, 363 F.2d at 995 (emphasis added).

In sharp contrast, the property claims brought here have not been committed by federal statute to the executive branch precluding a court from granting relief without "legislative provision." *Kelberine*, 363 F.2d at 995. As the Ninth Circuit noted in this case, Plaintiffs' claims for relief "arise under" clear standards of law, specifically "federal statutes, common law, state law and well-established case law." *Alperin*, 410 F.3d at 553. Most importantly the tortfeasors are known, specified in the complaint, and the converted property is alleged to be traceable to both the OFM and the Vatican Bank.

The D.C. Circuit Court's decision on the basis of a failure to state a claim because the requested relief was committed to the government and the allegations did not specify a known tortfeasor, are not factors in the determination of justiciability under the political question doctrine. Rather, here, the question was properly framed by the Ninth Circuit as whether the claims were capable of

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the earlier litigation, and settled it by agreeing to sell the property and transfer it to Interhandel, the court concluded the claims could not proceed. *Kelberine*, 363 F.2d at 995.

being remedied by the court as a matter of justiciability under the *Baker* analysis.

The contention that the D.C. Circuit would have decided this issue differently is speculative at best, given that the D.C. Circuit is also bound by this Court's application of the judicially-manageable-standards prong of *Baker* and *Vieth*. Indeed, the D.C. Circuit Court of Appeals recently held that judicially-manageable standards did not exist regarding claims that required the court to second-guess political branch support of covert actions during the Cold War. *Schneider*, 412 F.3d at 196-97. In deciding that there were no manageable judicial standards to resolve the claims, the D.C. Circuit Court notably did not rely on the *Kelberine* analysis. Rather, it focused on the fact that the claims would require evaluating the executive branch's decisions concerning national security during the height of the Cold War. *Schneider*, 412 F.3d at 196-97. Interestingly, the D.C. Circuit Court did not refer to *Kelberine* even though the underlying actions occurred thirty-five years ago and required extensive discovery.[11]

The district court cases relying on *Kelberine* cited by Petitioners are inapplicable to the Ninth Circuit's decision, have never been reviewed by a federal court of appeals and

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[11] Similarly, the district court's decision in *Ibrahim v. Titan Corp.* cited *Vieth* as the appropriate authority for the "standards" inquiry. *See* 391 F. Supp. 2d 10, 15 (D.D.C. 2005) (holding that claims brought by Iraqi national detainees for alleged torture at Abu Ghraib did not present political question). Like the Ninth Circuit in *Alperin*, the court noted that while manageability problems may emerge at a later stage, the case should not be dismissed on justiciability grounds. *Ibrahim*, 391 F. Supp. 2d at 16.

cannot create conflict among the circuit courts.[12] In each case, the district court found a non-justiciable political question where the court would have to pass judgment on previously made decisions regarding the claims by the political branches. *See Burger-Fischer*, 65 F. Supp. 2d at 282 (finding political question where the court would have to pass judgment on previously made reparations agreements between United States and Germany); *Iwanowa*, 67 F. Supp. 2d at 486 (stating that judicial relief would show lack of respect for reparations negotiations conducted by executive branch); *Anderman*, 256 F. Supp. 2d at 1115 (holding existence of treaties and executive agreements addressing the claims created a nonjusticiable political question); *In re African-American Slave Descendants Litig.*, 375 F. Supp. 2d at 758 (stating that Representative branch's historical consideration and rejection of reparations to former slaves in lieu of other forms of relief precluded claims under political question doctrine).[13]

Petitioners' attempts to focus on whether the case is factually and legally complex, rather than on whether constitutionally the judiciary is competent to adjudicate the claims, is unsupported by authority of this Court or the circuit courts that have adjudicated property claims arising in political contexts. Cases that involve the application or interpretation of the law do not present nonjusticiable

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[12] The district court decisions cited by Petitioners, which imported the *Kelberine* logistical language into the political question doctrine, have never been reviewed on appeal.

[13] *Zivkovich v. Vatican Bank* presented identical claims to the Plaintiffs' claims and was dismissed on identical political question doctrine grounds prior to the Ninth Circuit's decision in this case. 242 F. Supp. 2d at 668. It was never appealed to the Ninth Circuit and cannot be cited as support for a split among circuit courts.

political questions because the court is merely serving its primary function. *See Japan Whaling Ass'n*, 478 U.S. 221. Accordingly, there is no conflict among the circuit courts for which review is warranted. The petitions should be denied.

C. Property Claims Arising In the Context of Wartime Are Not Barred by the Political Question Doctrine

Contrary to Petitioners' assertion, there is no "near unanimous" body of authority holding that all claims for property losses occurring during wartime are nonjusticiable. *See* Petitioner IOR's Brief at 24. Rather, there is substantial authority demonstrating that federal courts are well within their constitutional power to adjudicate tort and property claims arising out of wartime. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (adjudicating property rights and other constitutionally based claims and rejecting President's decision to nationalize war industry in midst of Korean War); *Mitchell v. Harmony*, 54 U.S. 115 (1851) (examining actions of agents of President as Commander in Chief in wartime and awarding damages to civilian for seizure of property by military officer during war with Mexico); *Nemariam v. Fed. Democratic Republic of Ethiopia*, 315 F.3d 390 (D.C. Cir. 2003) (reversing dismissal on *forum non conveniens* grounds of thousands of property claims brought by Eritreans against Ethiopia arising during the Ethiopian-Eritrean war); *Siderman de Blake*, 965 F.2d at 713 (FSIA claims for conversion of property arising out of Argentina's "dirty war"); *Bodner*, 114 F. Supp. 2d 117 (holding no political question in action for damages, accounting, and recovery of looted property arising out of World War II);

Rosner v. United States, 231 F. Supp. 2d 1202 (S.D. Fla. 2002) (entertaining claim for unconstitutional taking and breach of contract arising out of World War II and its aftermath); *Ramirez de Arellano v. Weinberger*, 724 F.2d 143, 147 (D.C. Cir. 1983), vacated on other grounds and remanded by 417 U.S. 1113 (1985) (concluding that claims to property takings abroad caused by U.S. officials' decision to establish a military training facility did not present nonjusticiable political question); *see also* Thomas M. Franck, Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs 63-76 (1992) (noting "long strand of federal decisions" adjudicating property rights where case manifested foreign affairs and national-security aspects).[14]

Indeed, Congress has determined that courts are particularly competent to resolve property claims touching on foreign relations under the Foreign Sovereign Immunities Act ("FSIA"), under which Plaintiffs assert jurisdiction for their property losses.[15] Therefore, the Ninth Circuit

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[14] In the international context, the European Court of Human Rights has resolved over 80,000 World War II-related property claims. *See, e.g., Broniowski v. Poland*, 31443/96 [2004] ECHR 274 (2004) (holding for plaintiff against the Polish government in real property claim; also establishing that the court may order national relief to a class of similarly situated claimants where there has been a widespread, systematic violation.)

[15] Likewise, the Hickenlooper Amendment to the FSIA allows jurisdiction over property and tort losses caused by acts of terrorism. *See* 22 U.S.C. 2370 (2005). Moreover, the Executive has signed and Congress ratified several treaties, including the North American Free Trade Agreement and several bilateral investment treaties that assign property claims to be resolved by the courts without provision for special wartime consideration. *See* http://www.nafta-sec-alena.org/defaultsite/index (NAFTA text); http://www.state.gov/e/eb/rls/fs/22422.htm (bilateral investment treaties).

correctly analogized similar claims for the recovery of property stolen or looted during World War II when determining there were judicially discoverable and manageable standards, despite the politicized circumstances. In *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), this Court granted certiorari for the limited question of whether the FSIA applies to conduct prior to its enactment.[16] As here, the legal framework existed for courts to resolve *Altmann*'s property claims – claims that included declaratory relief, replevin, rescission, as well as damages for expropriation and conversion, violations of international law, imposition of a constructive trust, restitution based on unjust enrichment, and disgorgement of profits. 541 U.S. at 700-01.[17]

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[16] Notably, the Court did not address the political question doctrine where it reasonably could have were it a bar to jurisdiction. *See* Fed. R. Civ. P. 12(h)(3); *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 398 (1979). When based on the power or appropriateness of the Court to act, it would be well within the Court's power to raise the issues *sua sponte*. *See Rescue Army v. Mun. Court*, 331 U.S. 549, 570 (1947) (viewing justiciability as founded in the role of federal judicial review: "Like the case and controversy limitation itself and the policy against entertaining political questions, [footnote omitted] [the policy of strict necessity in disposing of constitutional issues] is one of the rules basic to the federal system and this Court's appropriate place within that structure").

[17] Petitioners' attempt to delineate between tangible goods in *Altmann* and fungible assets is an irrelevant distinction to the issue of justiciability. There are no less judicial rules or remedies for tort and property law violations when the res has been converted, than for an action for a specific res. *Cascade Energy & Metals Corp. v. Banks*, 896 F.2d 1557, 1584 (10th Cir. 1990) (adjudicating conversion claims involving gold mine with "complex facts underlying the many disputes between the parties"); *Archie Comic Publ'ns, Inc. v. DeCarlo*, 141 F. Supp. 2d 428, 430 (D.N.Y. 2001) (adjudicating conversion claims involving comic strip with "complex facts"). There are no governmental policy decisions reserved to the political branches regarding fungible

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Property claims against banking institutions for their participation in World War II activities have also withstood political question doctrine challenges. *See, e.g.*, *Ungaro-Benages*, 379 F.3d at 1230, 1237 (Plaintiff's claims that the Nazi Regime's program of "Aryanization" stole her family's interest in its manufacturing company "can be resolved through judicially discoverable and manageable standards"); *Bodner*, 114 F. Supp. 2d 117 (class action brought by Jewish customers of French banking institutions to recover specific sums of money and deposited assets stolen and retained by defendant banks decided on merits without mention of the political question doctrine).

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property claims or non-fungible property claims. Moreover, courts are equipped to adjudicate complex money laundering cases which involve voluminous, yet judicially manageable issues. *See United States v. Casamento*, 887 F.2d 1141, 1150 (2d Cir. 1989) (finding that "[t]he clearest indication that the jury was able to evaluate the evidence, despite its being voluminous, is provided by the jury's verdicts themselves."); *United States v. Bieganowski*, 313 F.3d 264, 282 (5th Cir. 2002) (explaining that "[t]he district court, however, had previously designated the case as complex, and the record . . . contains repeated reference to . . . the volume of discovery."); *United States v. Owens*, 159 F.3d 221, 227 (6th Cir. 1998) (noting that "the trial involved a complex, multi-object conspiracy and collateral issues of state law tried to a jury over the course of months"); *United States v. Thomas*, 774 F.2d 807, 811 (7th Cir. 1985) (upholding an ends-of-justice continuance based on the complexity of a fraud case with numerous defendants and thousands of financial documents); *United States v. Wadena*, 152 F.3d 831, 850 (8th Cir. 1998) (upholding the district court's refusal to sever even though the trial was complex and lengthy); *United States v. Johnson*, 297 F.3d 845, 859 (9th Cir. 2002) (noting that "[i]t is beyond dispute that the proceedings in this case were lengthy and complex. However, any prejudice that might have stemmed from the complexity of the trial was avoided by the district court's skillful handling of the case"); *United States v. Wellington*, 754 F.2d 1457, 1467 (9th Cir. 1985) (upholding the complexity of a mail fraud prosecution as a proper ground for the granting of a continuance).

Competency of courts to adjudicate and remedy property claims arising during the Holocaust-era is further supported by courts retaining jurisdiction to approve the settlement and distribution of claims in several large class actions. *See In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 168 (S.D.N.Y. 2000) (approving settlement of class action against Austrian banks for conversion of Nazi victims' assets and for profiting from their forced slave labor); *In re Holocaust Victim Assets Litig.*, 105 F. Supp. 2d 139 (E.D.N.Y. 2000), *aff'd*, 413 F.3d 183 (2d Cir. 2005) (approving settlement of consolidated class actions brought by Holocaust victims against two leading Swiss banks); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 81 (2d Cir. 2001) (approving settlement of consolidated class action brought by groups persecuted by Nazi Regime during World War II against Austrian and German banks seeking redress for various torts and international law violations).

Petitioners' argument that property claims in the context of war are *de facto* committed to the political branches does not comport with the international litigation arising under the expropriation of property exception under the FSIA, the Foreign Corrupt Practices Act, or the Alien Tort Statute. *See, e.g.*, *Siderman de Blake*, 965 F.2d 699 (FSIA claims for property losses during Argentina's "dirty war"); *Bodner*, 114 F. Supp. 2d 117 (ATS claims for property losses during World War II).

Accordingly, the Ninth Circuit's decision is in accord with federal court precedent on the political question doctrine and the adjudication of property claims arising in a wartime context. Review is not warranted, and the petitions should be denied.

III. JUDICIAL REVIEW OF PROPERTY LOSSES DOES NOT OFFEND THE CONDUCT OF FOREIGN RELATIONS

Contrary to Petitioners' assertions, there has been no executive initiative to resolve Plaintiffs' claims. The cases cited by Petitioners uniformly involve situations in which a court was confronted with the possibility of rendering a decision which threatened to duplicate, interpret, or conflict with concrete affirmative actions taken by the political branches in the conduct of foreign affairs. *See, e.g., Regan v. Wald*, 468 U.S. 222, 242 (1984) (holding that executive decision to maintain prohibition of travel to Cuba under authority of Section 5(b) of the Trading with the Enemy Act not subject to judicial review); *Harisiades v. Shaughnessy*, 342 U.S. 580, 581-84 (1352) (holding that judicial review of scope of alien expulsion power provided by Congress in Alien Registration Act of 1940 was improper).

In *Joo v. Japan*, the D.C. Circuit Court declined to second guess clear federal foreign policy in order to maintain separation of power. 413 F.3d at 53. Unlike the claims here, the claims were nonjusticiable in light of both U.S. treaties with Japan waiving claims by Allied nationals, as well as a Statement of Interest by the Executive demonstrating that adjudication "would undo" a settled foreign policy of state-to-state negotiation with Japan. 413 F.3d at 53.[18]

In this case, there is no treaty showing federal intent to preclude the judiciary from hearing Ustasha-related

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[18] The 1951 peace treaty with Japan clearly intended to remove United States judicial involvement from Japanese World War II-related claims and the State Department filed a statement of interest emphasizing that intent of the treaty. *See Joo*, 413 F.3d at 48-52.

cases. Rather, the Ninth Circuit, like the Eleventh Circuit in *Ungaro-Benages*, held that there was no political question where the Executive opted to not settle claims notwithstanding the power to do so. 379 F.3d 1227.

The Ninth Circuit also noted that there are no executive agreements extinguishing the Holocaust Survivor's claims against Petitioners. *Cf. Dames & Moore*, 453 U.S. at 680.[19] Nor is there even evidence of governmental negotiations regarding Plaintiffs' claims.[20]

Without any political branch initiative addressing the stolen property claims, the Ninth Circuit properly concluded that judicial review would not interfere with any conduct of foreign relations by the political branches. It stated, "[i]ndeed, this case is before us not because the

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[19] Even if there were treaties barring or addressing the claims against the Vatican Bank, the interpretation of war-time treaties explicitly barring certain claims is justiciable and within the power of the judiciary. *See Joo*, 413 F.3d at 52 ("It is of course true, as the appellants point out, that in general 'the courts have the authority to construe treaties and executive agreements'") (citing *Japan Whaling Ass'n*, 478 U.S. at 230); *see also Ungaro-Benages*, 379 F.3d at 1235-36. Moreover, while executive statements of interest clarifying or interpreting post-war treaties to bar claims are entitled to weight in the interpretation of treaties and the history of management of certain issues by the executive, they are not dispositive of the issue of justiciability. *See Joo*, 413 F.3d at 52 (citing *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982) and *Baker*). In *Rasul v. Bush*, claims brought by detainees arising out of hostilities between the United States and the Taliban were held justiciable despite the government's argument that the conduct of foreign affairs is committed to the political branches. 542 U.S. 466 (2004).

[20] The 1999 London Conference on Nazi Gold (organized by the British, not the United States) did not address the resolution of claims diplomatically. Rather, the Report makes clear that the Conference's purpose was to "illuminate long obscured facts" and to complete the "historical record."

Holocaust Survivors disagree with a political decision made regarding their claims, but rather because there simply has been no decision." *Alperin*, 410 F.3d at 557.

The Ninth Circuit correctly reasoned that adjudication does not "frustrate the operation of the particular mechanism the President has chosen," because there is no chosen mechanism. *Garamendi*, 539 U.S. at 424. Accordingly, judicial review of the property claims in no way thwarts executive discretion to set foreign policy and does not require the courts to second guess any known executive initiative.

Review is not warranted due to any threat to foreign policy, and the petitions should be denied.

IV. NO EXTRAORDINARY CIRCUMSTANCES JUSTIFY REVIEW OF AN INTERLOCUTORY ORDER

This Court generally does not issue a writ of certiorari to review an interlocutory order unless it is necessary to prevent extraordinary inconvenience and embarrassment. *Am. Constr. Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893). This case has been remanded to the district court for litigation on Petitioners' pre-answer motions to dismiss. Indeed, the Ninth Circuit noted that "[c]oncerns about class certification, discovery, and allocation, among other issues, are matters to be resolved at a later time." *Alperin*, 410 F.3d at 555. That fact alone is sufficient grounds for denying the petitions. *See Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application").

Petitioners have posited no compelling reasons or extraordinary circumstances warranting review. The Ninth Circuit's decision has created no conflict among the circuit courts or with the decisions of this Court. Given the interlocutory nature of this appeal, a writ of certiorari is untimely. Accordingly, the petitions should be denied as premature.

CONCLUSION

Review of this interlocutory order is unwarranted by any conflict with this Court's decisions or by any conflict in the circuit courts. The petitions should be denied.

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